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Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

Supreme Court of the United States
1st Street N.E. DC 20543-Clerk Office
202-479-3011

Joseph S. Maresca- Petitioner-Pro Se

versus

Dr. Elliot L Mancall MD Respondents
Thomas Jefferson University Hospital

On Petition for a Writ of Certiorari

To the Court of Appeals 3rd Circuit: 04-3103
(Rendell, Fuentes, Opinion by Garth
on 6-8-05 ;issued 6-16-05
Reconsideration Denial 12-19-05; Writ Due 3-20-06)

Joseph S. Maresca-Pro Se- PETITIONER
Of Record
Bronxville, NY 10708-0646
914-649-3817

RESPONDENTS

Marshall, Dennehy - Lawyers for Dr.Mancall MD
Aubrey J. Copeland, Esq. 620 Freedom Business Cntr.
Suite 300 King of Prussia, Pa.
Zip 19406

O'Brien & Ryan Attorneys 2250 Hickory Rd. Suite 300
Paul E. Peel, Esq. Plymouth Meeting, Pa. 19462
for TJUH -Appellee 610- 834- 8800

BOOK I OF II

QUESTIONS PRESENTED

Petitioner (Pro-Se), Joseph S. Maresca visited Dr.Mancall MD on 12-5-96 at age 44. An unknown medical student took the medical history in the outpatient clinic of Thomas Jeff. Univ. Hosp, Inc. He complained to both of a pulling of the facial mask, difficulty in typing & musculoskeletal limitations. Dr.Mancall ordered & the patient had a brain MRI showing cerebellar atrophy. The medical record showed a partially implemented plan with no monitoring. "Plan MRI. If OK, Fiorinal. return post-MRI". On 9-8-99, Dr.Waterman Rheum of UCONN ordered back x-rays showing Ankylosing Spondylitis. Diplomate Felder MD-Neurologist testified to the mis-diagnosis and non-monitoring of the patient in a multiple dependant trial exam incorporating the testimonies of Dipl. Deng-Acupuncturist, John Waterman MD-Rheumatologist, Dr.Mancall (defendant) and the plaintiff. A28-160 The DC Trial Court dismissed the action after closure of the Plaintiff's Case in Chief without "reserving judgment" in a Civil Rule 50 as a Matter of Law . Questions Presented Are:

1. Whether the DC Trial Court & 3rd Cir. Appeals applied the Civil Rule 50 as a Matter of Law properly despite 323(a) Restatement Torts at EADDY 694 A2nd at 642 BILLMAN ?
2. Whether an incurable but treatable bone disease Ankylosing Spondylitis is protected by the Pennsylvania statutes and whether or not MINE-SSA DI 280. 40.001 & the 5th Cir. 95-60433 conflict with the Pennsylvania Law , MCARE & the DC and 3rd Circuit opinions in this case? Trial A 28-165
3. Whether a Manifest Injustice accrues to Ankylosing Spondylitis patients & others; i.e. late stage Tay Sachs on incurability and patient's 1st, 7th, 11th ,14th & 21st amendment rights & protection from local practice limits by Felder v. Casey all abridged by lack of clarity in Brophy v. Brizuela OBVIOUSNESS criteria or Metzelfelt UNOBVIOUS disease criteria?
4. Whether or not the Fed Register Vol. 63 #35 issue 2-23-98 P. 8990 applied to the Thomas Jefferson Univ. Hospital Inc; such that a compliance officer required by statute would have mitigated Petitioner's damages .The Trial Court should have "reserved judgment" and considered "systemic negligence" .
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A.133 Pathology report of Dr.Dworkin MD-Surgeon findings of Crohns 12-20-91 noted in Dr.Mancall's encounter form 12-5-96

A.134 Article on Mortality Among Patients with Ankylosing Spondylitis Not Given X-ray Treatment VOL. 297 7: 572-7 9-15-77 New England Journal of Medicine cited as per Civil Rule 803.18 with attributions to other authors citing this article

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DC Court Approved Trial Exhibits-Unobjected

SUPREME COURT APP.	DC TRIAL COURT APPROVED EXH.
A115-128	Trial Exh.43-53 and 55 for Dr.Mancall
A39-43	Trial Exh. 1-40 Diplomate Deng-Acupunc.
A67-A69 A79-A83	Trial Exh. 71-3 , 89 and 300 Dr.Kellman
A66-A71	Trial Exh. 91-96 Dr. Waterman MD-Rheumatologist
A156-A160	Trial Exh. 97-100 for Dr.Lee MD Physiatrist
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A135-143	Expert Letter of Diplomate Felder MD Neurologist and Psychiatrist Trial Exh. 142-145 under advisement until conclusion of Defendants Cases in Chief
A133	Trial Exh. 117 Colonoscopy of Dr.Dworkin finding Crohns Disease - Exhibit taken under advisement
A.55-6	Thomas Jefferson Univ, Hospital,Inc. corporate charter (excerpts) filed with Pa. Sec'y of State (excerpts for the Jefferson Medical College)
A131-2	Trial Exh. 135-6 of Dr.Abel MD Encounter form referral to Rheum.

Cited Authorities

1. Section 323a of the Restatement of Torts (Second) , Eaddy 694 A 2nd at 642 ; Billman 781 A 2nd at 1212-13 cites the risk of harm as the dispositive criteria for overcoming a Rule 50 Motion as a Matter of Law.

" Accordingly, if a plaintiff has proven that the physician's breach increased the risk of harm, then there is sufficient evidence to overcome a Motion as a Matter of Law. The expert in cases of this nature has been permitted to testify under the relaxed degree of certainty enunciated in Sec. 323a of the Restatement (Second of Torts), that the defendant's failure to exercise reasonable care in the diagnosis and treatment was a substantial factor that increased the risk of harm. "

2. Citation which conflicts with the decision on this case:

"He was diagnosed as suffering from Ankylosing Spondylitis, a chronic, progressive and debilitating disease which fuses the spine and causes rigidity of the cervical, thoracic and lumbar vertebrae."

Smith v. United States Railroad Retirement Board 95-60433 United States Court of Appeals 5th Circuit by Chief Politiz, Davis, Garza

This case defines Ankylosing Spondylitis, its major manifestations and causal elements.

3. There is an exception from the governing precedents of the medical malpractice law in Pennsylvania when:

"The matter is so simple and the lack of skill or want of care is so obvious as to be within the comprehension of a non-professional person(s) "
Brophy v, Brizuela 358 Pa. Super 400, 405, 517 A 2nd 1293, 1296 (1986)

4. Under applicat ennsylvania law, professional negligence in the nature of medical malpractice consists of the following:Pa. Stat. Ann. tit. 40 Par 1303.512 LEX'03

1) a duty owed to the plaintiff
2) a breach of the duty by a physician or institution
3) a causal connection with plaintiff's harm
4) a direct link between the harm and plaintiff's damages

Mitzelfelt v. Kamrin 526 Pa. 54, 62 , 584 A 2nd 888,891(1990)

[The law doesn't say that the physician must cure the patient or that incurable but highly treatable diseases aren't protected.]

5. Rule 60 (b)(2) provides:

" The question therefore, is whether a general rule of law applicable to many cases is desirable and feasible, or whether to rely on more flexible ad hoc judgments. If an issue is one of law, appeal can be taken in every case where that issue is presented in a context slightly different from those for the precedents on that issue. In its decision the Appeals Court must make reference to the fact that the District Court ruling was not sustained by the evidence. "

6. Rule 52 does not inhibit the Appellate Court from correcting errors of law.

Ct. at 1530 89L Ed. 744-749

7. Mixed questions involve whether or not the rule of law as applied to the established facts is or is not violated.

456 U.S. at 289 *n* 19 102 S. Ct. at 1790 *n.* 19 475 U.S. at 714 106S Pa. R. Civ. P. 1042.3

8. Assuming a literal application of the Pennsylvania law under the Mitzelfelt criteria, would a manifest injustice accrue due to the actions of the Trial Court?

Roberts v. Madigan 921 F 2nd 875, 9th Circuit, 10th Cir.'90
Cale v. Johnson 861 F 2nd 943, 947, 6th 1988
Arizona v. Cal. 460 U.S. 605 1983

9. The medical malpractice statute in Pennsylvania does not accrue until the plaintiff discovers or reasonably should have discovered that the physician failed to diagnose and treat him/her ; such that, the failure is a causal factor in the injury. On the basis of this precedent, plaintiff's Summary Judgment was granted by The Honorable Legrome D. Davis. 6-20-03.

[DC Docket #47]

Hughs v. U.S. 263 F. 3rd 272, 276-7, 3rd Circuit 2001

10. A hospital may be held liable under the theory of corporate negligence. Under this theory of liability, a non-delegable duty is created which the hospital owes directly to the patient and the injured party doesn't have to rely on or establish 3rd party negligence. This has been delegated thusly into 4 categories:Pa. Stat. Ann. tit. 40 Par 1303.516 LEXIS 2003:

1) a duty to use reasonable care in maintaining safe and adequate facilities and equipment
2) a duty to select and retain only competent physicians
3) a duty to oversee all persons who practice medicine within its walls as to patient care
4) a duty to formulate, adopt and enforce adequate rules and policies to enforce patient care.

Thompson v. Nason Hosp. 527 Pa 330-591 A 2nd 703 1991 1d at 339-40 591 A 2nd at 707

11. Neglectful inaction rather than a specific act itself by hospital employees will trigger liability.

Moser v. Heistrand 545 Pa 554, 560, 581, 681 A 2nd 1322, 1329, 1996

12. The Parol Evidence Rule may be involved to clarify an ambiguity; such as an entry which is on the encounter form or one that should be there. It may be utilized to establish bad faith, to resolve an error conclusively or to establish error.

Ref. Thomas Jefferson University Hospital encounter form 12-5-96 Expert Letter of Diplomate Felder MD-Neurologist A. 76-79

13. The following parts deal with patient medical records preparation in form and content.

"A patient's medical records shall be complete, readily accessible and available to the professional staff concerned with the care and treatment of the patient."
28 Pa Code 115.31 (2b)

"A physician shall maintain medical records for patients which accurately, legibly and completely reflect the evaluation and treatment of the patient."
49 Pa Code 16.95

"A patient's medical records shall be retained by a physician for at least 7 years from the date of the last medical service for which a medical record entry is required."
49 Pa. Code 16.95(e)

"The medical record shall contain information sufficient to clearly identify the patient. The person making the entry , if not the physician, such as a physician assistant, the date of the medical entry and patient complaints and symptoms should be noted. " 49 Pa Code 16.95(e)

14. The following part deals with the requirement for compliance reviews and a compliance officer to monitor teaching physicians and residents in teaching facilities; such as, Jefferson Medical Col.
"FR Vol. 63 #35 MONDAY 2-23-98 Fed.Register Pg.8990"

15. 28 Pa Par 115.34 requires a medical records review by the medical records committee for completeness including a system for disciplinary action and requires that recorded clinical information be sufficient for medical care evaluation.

16. The Pennsylvania Medical Board Sec. 11e requires that notes made on patient's charts by a clinical clerk (medical student) become official only when counter-signed by a medical doctor or member of the hospital medical staff or resident beyond a first year level of graduate medical education at the hospital.

17. This is a dispute between a citizen of New York-the Plaintiff, Dr. Mancall MD who resides in New Jersey and the institution of Thomas Jefferson in Philadelphia. The appeal very importantly separates law and facts gleaned from the multiply dependant expert testimony and the myriad of fact witness testimony that supports the expert witness includes the Trial Exam of the plaintiff/appellant, Diplomate Deng-acupuncturist, Dr. John R. Waterman MD-Rheumatologist, Diplomate Felder MD-Neurologist, Dr.Kellman MD and Dr. Lee MD, PhD - treating physicians. The 14th Amendment protects clearly the medical rights of the Plaintiff/Appellant because no state can enforce laws which constructively-in their implementation abridge a citizen's constitutional rights. The Court is asked to weigh state powers over the rights of the individual. Lastly, the government has issued a mandate requiring medical school institutions and their related hospitals to engage a compliance official and do periodic audit reviews. The 11th amendment places this issue in the State courts or Court of Common Pleas. DC docket 1-6.

This mandate predates by a year and one half, the reasonable 9-15-99 discovery of ankylosing spondylitis by Dr. Waterman MD-Rheumatologist at UCONN.

18. A new MCARE fund limitations for 2006 are $750,000/ $2.25MM for physicians and $750,000/$3.75MM for hospitals. Pa.Stat.Ann.tit.40 Par 1303.714,715 (LEX '03)

19. Constitutional Amendments:

FIRST- Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble; and to petition the Government for a redress of grievances.

SEVENTH- In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury, shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

FOURTEENTH-SECTION I- All persons born or naturalized in the U.S., and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of any citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The petition for redressing grievances and provisions of the 14th amendment dealing with due process and equal protection were first referenced in the DC docket 12- "Complaint", DC docket 38 Opposition to Summary Judgment, DC dockets 44, 45 containing the Petitioner's Opposition to DEFENDANT's Summary Judgments, Rule 50 Argtument at Trial DC docket 85, Petitioner's Request for Reconsideration of the Court's 5-7-04 finding for Defendants as a Matter of Law-DC Doc 87

Essentially, the medical malpractice deprived the Petitioner of life, liberty and property for the period from 12-5-96 to 9/1999 and during the exhaustive pendency of this case in the Courts.
[3 years non-diagnosis and 5 years in litigation]
20. The Supreme Court has interpreted the common law in the 7th Amendment to be the apotheosis of the English Common Law as it existed in 1791.

Dimick v. Schiedt 293 U.S. 474, 496-7 (1935)
Markman v. Westview Instruments 517 U.S. 370, 376, 196 quote Balt. and Carolina, Inc. v. Redman 295 U.S. 694 (1935)

Generally, a jury is the independent check on the power of the Judiciary. A jury alone can determine damages.

Thomas, Remittitur, supra note 27 at 770 and 794

When given the option of a new trial or remittitur in 71% of cases, plaintiffs took remittitur or settled the case. It is indisputable historical precedent that the role of the jury is a decision-maker on damages and the Constitutional text supports this role in the 7th Amendment. The 11th amendment places the issue in the Common Plea Court.
21. The DC Court considered a Civil Rule 50 Motion as a Matter of Law at the beginning of the trial and denied the Defendants. The Motion was issued again at the closure of Plaintiff/Petitioner's Case in Chief. The DC Court should have "reserved judgment" to gain perspective on the contrasting presentations. In addition, the DC Court caused the presentation to be highly abbreviated by requesting that parties limit the trial to 3 weeks. Since the Petitioner presented his witnesses and agreed to depose the defendant and the defendants' experts in the Defendants' Cases in Chief, the DC Court should have "reserved judgment" after having gained the cooperation of the Petitioner in limiting trial presentation time by not examining the defendant or the defendants' experts in the Plaintiff's Case in Chief.

21. On 10-22-01, the case was removed from the Court of Common Pleas in Philadelphia to the District Court for Eastern Pennsylvania 01-5355 for assignment to the Honorable Schiller. The defendants' legal rationale was the existence of "diversity " only.

The plaintiff issued a Motion explaining that the case belonged in the Philadelphia court because the local jurisdiction was more familiar with the local law and practices. The defendants moved the case from Common Pleas to the federal jurisdiction because juries tend to make higher awards to plaintiffs in Philadelphia.

The juries are selected statewide in the federal jurisdiction and awards are slightly lower as a result of the statewide diversity in the jury selection itself. Constructively, insurers save money by litigating in the federal jurisdiction because the Philadelphia jury awards are approximately $100,000 to $150,000 higher than federally.

DC Docket 1-6, DC Docket 7-transfer of the record

Although insurers save money by paying lower awards federally, the federal court system is burdened with extra cases which belong in the State courts or the local Court of Common Pleas in Philadelphia.

In addition, Metzelfelt is murky. It does not explain how to apply obviousness and unobviousness criteria uniformly. Resultingly, jurists are free to write new medical law. Felder v. Casey, 487, U.S. 131, 138 '88 was decided by this Court to protect the rights of individuals from encroachment by local practice customs and laws which effectively remove the rights enunciated in the 1st, 7th, 11th and 14th amendments to the Constitution.

Parties Whose Judgment Sought for Review (Items 1-3)

The parties whose judgment is sought are:
1. Appellate Court 3rd Cir.-Case 04-3103
The Honorables Rendell, Fuentes and Garth
Petition to Rehear Denial - The Honorable Rendell
Order entered 12-19-05: Petition filed on Appellate
Docket Entry #48

Order Affirming a DC Court of Eastern Pennsylvania
finding for the Defendants on a Matter of Law by the
entered on 6-16-2005 by
Honorables Rendell, Fuentes, Garth-Opinion Issuer)
Judgment Order on Appellate Docket # 42;
Docket Opened #1; Brief of Appellant Filed #19;
Proposed Amicus Curiae Brief by Diplomate Deng #22;
Clerk Order Referring Case to a Merit Panel#23
Basis: Sec 323(a) Restatement (Second of Torts);
Parol Evidence Rule Applicable to the Expert Letter of
Diplomate Felder MD-Neurologist,Psychiatrist and all
fact testimony by video presentation at trial and trial
transcript of Dr.John R. Waterman MD 5-4-04; the personal
testimony of Diplomate Deng-Acupuncturist at trial on
5-4-04; the Amicus Curiae Brief of Diplomate Deng and
the fact testimony of the treating physician Dr.Kellman MD-
Internist by Video and trial transcript 5-4-04.

Lack of clarity regarding how to apply the causal connection
between the physician's harm and the plaintiff's damages.
i.e. scintilla of evidence standard, grey area or reasonable
person standard.

The institution of Thomas Jefferson University Hospital,Inc.
is not in compliance with Federal law-FR Vol.63 #35;
2-23-98; P. 8990 requiring a Compliance Officer; such that,
Petitioner's claim may have been halved with compliance
federally. Discovery Denial-DC Docket 26 of 11-12-02.

2. Rule 50 Order in Favor of Defendants at Conclusion of the Plaintiff's Case in Chief by the Honorable Legrome D. Davis of the District Court of Eastern Pennsylvania

[DC Docket 86 on 5-10-04]

Reconsideration Denial Due to the Filing in the Appellate Court Taking the Case Out of the District Court Without Prejudice 8-30-04

3. The 11-19-02 Denial of Plaintiff's Motion for Remand should be reviewed because the in depth knowledge of the medical malpractice law is in the Court of Common Pleas, Philadelphia. Docket #6 by Honorable Schiller

Basis: The DC Court should have reserved judgment to allow a full discussion of the evidence and the expert letters. In addition, the Court did not give sufficient consideration to Sec. 323a-Restatement of (Second)Torts which relies on the physician failure to exercise reasonable care in the diagnosis as a condition precedent for continuing the trial. In addition, the Trial Court mis-interpreted the causality of the disease Ankylosing Spondylitis with Metzelfelt's requirement for a causal connection between the harm arising from the physician negligence with the accompanying pain, suffering and quality of life issues for the patient.

Eaddy 694 A. 2nd at 642 cites Billman 761 A.2nd at 1212-1213

In addition, SSA DI 280 40.001 MINE Sec. 416.99c is the governing law on the definition and treatment of Ankylosing Spondylitis. The law defines this as a MINE disease. Medical Improvement Not Indicated is the classification. MINE relegates the claim to treatment of symptomatology explained by Diplomate Felder MD-Neurologist. A.113 p.110

The case was moved from the Court of Common Pleas-a Court in the Commonwealth of Pennsylvania into the federal jurisdiction under the guise of "diversity" of the parties to the litigation. This action on the DC Docket#1-6 violates the spirit of the 11th Amendment to the Constitution which exists to prevent citizens from different states from arguing in the federal courts. The initial ruling which placed this case in the federal jurisdiction was affirmed by the Honorable Judge Schiller of the DC -Eastern Pennsylvania.

The defendants filed Motions in Limine to preclude the testimony of the plaintiff's physician witnesses in the overall presentation. Metzelfelt does not require setting aside the testimony of all physician witnesses except for the expert witness and Brophy v. Brizuela allows all testimony (expert or non-expert) if the medical presentation is or would be obvious to a non-practitioner in the art to which the plaintiff's claim applies. Therefore, the Motions in Limine would not apply to the testimony under the Brophy v. Brizuela criteria. It is unclear whether or not the Metzelfelt criteria bars "fact witness" testimony. Besides the Motion in Limine does not apply since the expert witness has incorporated by reference the depositions of Dr.Mancall, Diplomate Deng and the Rheumatologist-Dr.Waterman MD of UCONN.

[DC Docket 59, 64,70,72]

In addition, Dr.Waterman MD-Rheumatologist indicated that the legal counsel of the Veteran's Administration Hosp. barred him from providing expert trial testimony. The Supreme Court is asked to view the testimony of Dr.Waterman MD- as though he was an expert. Besides, the Felder v. Casey precedent overcomes the implementation of a narrow local law when it unfairly deprives rights otherwise guaranteed under the United States Constitution. (1st, 7th, 14th Amendments)

Jurisdiction: In all cases, a DENIAL for Rehearing by the 3rd Circuit Appellate places the case in the U.S. Supreme Court for appeal. A. 24 (Panel:Rendell,Fuentes,Garth) Opinions Below: DC A. 1-18; 3rd Circuit A19-A.27

Constitutional Analysis: [Medical Malpractice Case]
"The Constitution of the Republic should make provision for medical freedom as well as religious freedom. To restrict the art of healing to one class of men (people) & deny equal protection to others will constitute the Bastille of Medical Science. by DR.BENJAMIN RUSH MD [Physician and Signer of Declaration of Independence]
The first amendment grants the Petitioner the right to petition the federal government for grievances. The fifth amendment guarantees the right to life and liberty under due process of law.
The seventh amendment preserves the right of trial by jury where the value of controversy exceeds $20. The Rule 50 argument curtailed this right of the Petitioner arbitrarily and against the public interest. Even the lower courts found trialable issues on the medical negligence issues. Essentially, a murky law gave the trial court the discretion to curtail the trial based on judgmental factors rather than "reserving judgment" to get a clearer sense of the comparative discussion of the evidence. In addition, the lower courts mis-apprehended the nature of a MINE claim which is a disease process where Medical Improvement Is Not Expected. The claim in this case is for the 12-5-96 to 9-15-99 period of non-discovery, non-monitoring and non-treatment of ankylosing spondylitis OR the risk matrix by the EADDY 694 for evaluating a case at the closure of the Plaintiff's Case in Chief. The trial court gave little or no weight to huge bodies of testimony by Diplomate Deng as to range of motion (5 months preceeding Dr.Mancall's exam) & the UCONN Medical School discovery of ankylosing spondylitis by Dr.Waterman-Rheumatologist,Internist.

These trial examinations and the treatment regimen Trial Exam of Dr.Kellman-MD-Treating Internist were ignored or given no weight due to METZELFELT - an ill-defined law in implementation in a parochial local practice setting. FR VOL 63 #35 2-23-98 FR 8890 was violated by not having a COMPLIANCE OFFICER.

Testimony

Joseph S. Maresca (Plaintiff) A.28-A.32 at trial
[Establishes that the plaintiff demonstrated spinal problems to Dr.Mancall and his medical student]
Diplomate Deng-Acupuncturist A.33 to A.43 at trial
[Independently authenticates the plaintiff's statement]
Dr.Mancall MD-Defendant A. 44 to A.56
[Demonstrates forgetfulness and failure to document]
Dr.John R. Waterman MD-Rheumatologist-Video at trial
Trial Transcript A. 57 to A. 70
[Demonstrates discovery and treatment regimen 9/15/99]
Dr.Kellman MD-Internist - Video at trial A. 72 to A. 82
[Demonstrates receipt of letter from Dr.Waterman and extensive treatment regimen in the 9/15/99 post period]
Diplomate Felder, Neurologist and Psychiatrist A.84-143
[practices in the art of neurology as does Dr.Mancall and reviews Dr.Mancall's exam faults and connects to risk from 12-5-96 to 9/1999 -explains treatment for symptoms only- connects to professional literature citations- definitively opines that plaintiff had Ankylosing Spon. on 12-5-96 and all symptomatology thereof]

Dr.Lee MD, PhD-Current treating physician explains comparison x-rays and schober tests after 2000 to 09/1999 A. 144 to A. 160 approved excerpts read at trial by the Plaintiff-Pro-se, Mr. Goewert, Esq. for Dr.Mancall and Dorothy Duffy, Esq. for Thomas Jefferson Univ. Hosp. The fourteenth amendment says that no state shall enforce laws that abridge the rights of citizens. The lower courts abridged rights by removing the Petitioner's case from a jury due to a murky law METZELFELT. The trial courts applied the wrong law. The correct law is EADDY 694.

In applying METZELFELT, the lower courts gave too much deference to the incurability issues which aren't mentioned in the law. The lower courts dismissed the competent testimony of Diplomate Deng on range of motion issues a full 5 months preceding the 12-5-96 exam by Dr.Mancall-the defendant. Dr.Waterman attested to a considerable musculoskeletal problem, spinal inflammatory issues, treatment protocols, daily exercise protocols and the certain existence of ankylosing spondylitis on 9/99. The lower courts failed to consider critical range of motion evidence in the forms of spinal x-ray reports and a memo describing the inability to do a sit-up or run [Approved Exh. 49] brought to the 12-5-96 defendant's exam by the Petitioner. A. 124, A. 125
This case was transferred from the Court of Common Pleas to the DC-Eastern Pa. on "diversity". It belongs in the Court of Common Pleas by the 11th Amendment. A23 The 27th amendment provides for equal rights and it is supplemented by further provisions in the Americans for Disability Act of 1991 providing added protection for Americans having disabilities. Ankylosing Spon. as defined defined in Smith v. U.S. RR Board 95-60433 contradicts the causality requirements of METZELFELT.

Statement of the Case
Facts
In August/1991, the petitioner visited Dr.Mancall at the Hahnemann Hospital in Philadelphia. The patient complained of intense lumbosacral strain and chronic low-grade fevers diagnosed in 12/91 as Crohns disease. Dr.Mancall ordered a complete MRI of the spine which showed discogenic disease at L-4 L-5 levels. The discogenic disease was treated with intensive physical therapy until a successful remission.
On 12-5-96, the petitioner again consulted Dr.Mancall complaining of intense pulling upward of the facial mask. He demonstrated a protruding head when standing erect.

In addition, the petitioner brought a memo describing an inability to do a sit-up or run. [A.124-125] Dr.Mancall watched the petitioner's demonstrations of the head protruding from the wall while standing erect and indicated to the petitioner " No. No. Don't Touch the Spine". A.32 Instead, Dr.Mancall ordered a brain MRI which the patient completed and a diagnostic report was sent to Dr.Mancall indicating cerebellar atrophy. [A.118-19] Dr. Mancall left the medical record with the words "Plan MRI, If Okay,Fiorinal, return post-MRI. " A. 115, A. 116: [Trial Exam testimony A28-54; A57-82;A83-143] The petitioner was told to take a muscle relaxant with a local practitioner only. The plaintiff's expert witness, Dr.Felder MD testified that the patient had ankylosing spondylitis and symptomatology thereof on 12-5-96. Dr.Mancall operated an Outpatient Clinic with his medical student residents from the medical college of the Thomas Jefferson University Hospital, Inc. An undisclosed medical student took the patient's medical history during the 12-5-96 examination.
Parties Whose Judgment Sought: The 3rd Circuit Panel 04-3103 and the DC Trial Court 01-5355 A.[1-25]

Reasons for Granting the Writ of Certiorari:# 1-5
[Initially Raised in DC Reconsideration-Docket 87 on]
1. The decisions of the 3rd Circuit and the DC circuit for Eastern Pennsylvania departed from the classic definition of Ankylosing Spondylitis in the federal law :
SSA. DI 280 40.001 MINE 416.99c
Federally, Ankylosing Spondylitis is classified as Medical Improvement Not Indicated so that the treatment protocol focuses on maintenance and the prevention of further disease progression- not curability as interpreted by the lower court decisions. The Pennsylvania medical malpractice law is being interpreted in a way that is counter to the longstanding precedent federally.

The concept of causality is irrelevant because the disease is incurable. A doctor can deal with pain/suffering and disease progression only.

2. The decisions of the lower courts conflict with another circuit on the same issue. Case 95-60433 involving Smith v. U.S. Railroad Board, 5th Circuit U.S. Court of Appeals , Politz, (Chief) set forth the Ankylosing Spondylitis disease criteria, known causality and most outstanding manifestations.

> **"He was diagnosed as suffering from Ankylosing Spondylitis, a chronic progressive and debilitating disease which fuses the spine and causes rigidity of the cervical, thoracic and lumbar vertebrae."**

These manifestations were proven by the Trial exam of Diplomate Deng-Acupuncturist a full 5 months prior to the visit to Dr.Mancall on 12-5-96. A. 33-43 and Diplomate Felder MD-Expert A 99-A 103 relies on the statements in formulating his opinion. The defendant's expert places the Ankylosing Spon. in the 1995-1996 period. A.164 and A. 161-165

3. The 3rd Circuit Court of Appeals has decided an important question of federal law that should be settled by the Supreme Court. The lower courts are confusing causality of the disease process Ankylosing Spondylitis with causality of the pain and suffering loosely connected to the physician negligence in the Metzelfelt criteria. The lower courts are writing new medical malpractice law. Only an appeal to the United States Supreme Court can decide definitively the dividing line of causality when a murky law does not provide decisive criteria understandable to a reasonable person or even the lower courts themselves.

Felder v. Casey , 487 U.S. 131, 138 (1988)

It has been clearly established that this Court will protect an individual's federal rights from being limited by local practice. The rulings of the 3rd Circuit and lower DC Court are a direct attack on this long held principle and also a violation of the Supremacy Clause and the Due Process Clause of the United States Constitution. 2nd, this Court has ruled that a state may not create "unreasonable obstacles" of an individual's federal rights.

Brown v. Western Railway 338 U.S. 294, 301 (1949)

The 3rd Circuit has used a confusing local law to deny a right granted to the petitioner federally by the Constitution and SSA DI 280 40.001 MINE 416.99c [MINE=Medical Improvement Not Expected] . The local law of Pennsylvania requires a causal connection between the physician negligence and the pain/suffering or harm. In addition, the local law is segmented into 2 parts.

The obviousness part of the law requires no expert if the manifestations are so obvious as to be perceptible by a non-expert; such as, Diplomate Deng-Acupuncturist. A. 33-43 The unobviousness part , espoused in Metzelfelt requires a loosely knit causal connection between the harm (pain/ suffering) and the physician negligence. The law doesn't say when or how to distinguish between obviousness and unobviousness with a uniform rule structure. The absence of a rule structure to determine causality creates enough confusion ; such that, a trial judge can abuse discretion without having the factual basis to do so. In formulating an opinion, Diplomate Felder relied upon a pyramid of facts gleaned from the filed depositions of the defendant, Dr.Mancall, Dr. Waterman MD-Rheumatologist-Trial Examination and Video and Diplomate Deng's deposition and subsequent 5-4-04 trial appearance, testimony and admitted documents - Trial Exhibits 1-40.

The trial judge discarded all testimony except for the expert-Diplomate Felder MD-Neurologist. Even the Pennsylvania law does not bar parol evidence or the testimony of treating physicians specifically. Besides, EADDY 694 is the applicable law for the Petitioner's Case in Chief closure on 5-5-04. Both lower courts have applied the wrong law to the facts.

"Accordingly, if a plaintiff has proven that the physician's breach increased the risk of harm, then there is sufficient evidence to overcome a motion for judgment as a matter of law. The expert in cases of this nature has been permitted to testify under the relaxed degree of certainty enunciated in Sec. 323a of the Restatement (Second) of Torts, that the defendant's failure to exercise reasonable care in the diagnosis and treatment was a substantial factor that increased the risk of harm. "

Eaddy 694 A 2d at 642 citing Billman 761 A 2nd at 1212-1213. [5-7-04 decision of the Honorable Judge Davis]

4. The lower courts stated the Metzelfelt rule of law improperly and they gave no credence to the obviousness criteria under Brophy:

Brophy v. Brizuela, 358 Pa. Super 400, 405, 517 A. 2nd 1293, 1296, '86

Clearly, the lower courts gave too much credence to the incurability of ankylosing spondylitis which dismisses the petitioner's pain and suffering unjustly for the period 12-5-96 to 9-9-1999 -the discovery of the Ankylosing Spondylitis at the UCONN Medical School facility. At the least, the DC court should have "reserved judgment" until the conclusion of the Defendants' Cases in Chief.

5. The previous Administration issued definitive guidance for strengthening the control structure of Teaching Hospitals, teaching physicians and residents in :FR Vol 63 #35 MONDAY 2-23-1998 P. 8990 The Office of Inspector General (OIG) required teaching facilities to engage a Compliance Officer to deal with areas of patient exposure and compliance reviews. The Petitioner tried to secure the testimony of the Compliance Officer on 11-12-02 by issuing a Motion to Compel the Thomas Jefferson University Hospital to provide answers on the existence of a Compliance Officer. If a Compliance Officer had been in place, the Petitioner's pain and suffering might have been halved because a quality control audit could have uncovered Dr.Mancall's non-monitoring of the case. The Court denied the motion on 11-20-02. Dkt. 26,30 The non-existence of a Compliance Officer could be a significant breach of the federal law; such that, the institution so far departed from accepted practice as to invoke the Supreme Court review.

The trial court requested that the parties limit their presentations to under 3 weeks. Accordingly, the parties accelerated the trial process by agreeing to call plaintiff witnesses first and deposing the defendant witnesses followed by the plaintiff cross examination. This prior agreement had the defendant and defendant experts being cross-examined in the Defense Case in Chief with no examination in the Plaintiff's Case in Chief. Although the Court sought to save time in limiting the trial to 3 weeks, the Court did not disclose how this would impact the Rule 50 invocation. In addition, at various junctures, the plaintiff complained that the defendant exhibits were being entered into evidence while the court did not prepare evidence forms for the plaintiff exhibits entered into evidence. A.16; A. 166 to A. 170

At the appellate level, the Court had no way of knowing which evidence was entered by the Plaintiff's Case in Chief because the DC court simply did not record the entry of the evidence. The combination of DC court errors, ambiguity of the Pa. law and judicial application of the Pa. law deprive the Petitioner of his 1st, 7th, 11th, 14th & 21st Amendment rights and guarantees under the Americans for Disability '91. The disability protections may apply to a pro-se as a defacto Officer of the Court .

6. Expert Testimony and Analysis:

During his 1-16-04 video trial deposition Diplomate Felder MD said: A 83 to A 143

Q. All right. Based upon the letter given to Dr. Mancall in the 12/96 exam describing the inability to do a sit-up or run, are those still very important things that have been brought to Dr.Mancall's attention that are pertinent to a diagnosis of ankylosing spondylitis.

A. Well , they would be pertinent. A.96; A. 114-116, A. 124-125; ALSO 3rd Circuit APP. A 133 p. 116 ln. 8 on and p. 115 ln. 3-15

Trial Exhibit 49 is a memo brought by the appellant to Dr.Mancall on 12-5-96 which he has admitted to reading. The memo mentions specifically the inability to do a sit-up or to run. A. 124 Admitted by the Trial Court

Dr. Mancall's 7-24-02 depo. A. 313 p. 46-7 & Diplomate Felder A.112 pp. 32 ln. 11- 3rd Circuit APP.

Q. Then there was another document which I brought to the Outpatient Neurology Clinic. I had given this initially to the medical student and I believe it is in the folder. At the bottom in the last- the next to the last paragraph I have in yellow. There appears to be some permanent restriction in the ability to do a sit-up or to run at maximum speed. That's mentioned in this along with other items. Did you read this memo at all?

A. Yes. (by Dr. Mancall)

Analysis:
Dr. Mancall knew the plaintiff had a restricted spinal ability to do a sit-up . He also knew that the musculoskeletal system was not working because the plaintiff could not run. He knew of discogenic disease by a '91 exam. [A 18-20 the 3rd Circuit APP.)
Dr. Mancall ordered a complete MRI of the spine during an 8/1991 full examination. A 126 to A 128
A reasonable person would conclude that upon leaving the exam with no spinal treatment protocol- this would be a harm causally connected to Dr. Mancall's exam or failure to investigate the spine in any depth. This aspect is cemented further by Diplomate Deng's appearance at trial A.33-43 Supplemental APP on Appellate Docket 56 & Dipl. Felder's Letter Trial Exh 142-5 & A 83-143

Diplomate Felder affirmed his expert letter of 11-22-02 in its entirety at the end of his trial examination.
A. I would say I still hold those conclusions. A.113 p.115

Diplomate Deng followed up with an Amicus Curiae brief setting forth the range of motion items in considerable detail. In the original ruling of 5-7-04, the Honorable Davis believed that Dr. Mancall had in his possession information as to the tension headache only. The Court erred in not considering the above testimony. A124-5
Dr.Mancall's testimony is laden with plausibly deniable statements designed to avoid paying the claim. A44-A54

In fact the plaintiff demonstrated the spinal limitations to Dr. Mancall during the 12-5-96 encounter and Dr.Mancall declared "No. No. Don't touch the spine.!" [A. 28-32] Dr. Mancall's failure to treat the spinal condition present was a substantial factor in bringing about the harm which was that the plaintiff continued to walk around/ambulate for 3 years until the correct diagnosis was made and treatment provided.

The plaintiff continued to walk, travel along subway platforms, drive and even engage in strenuous physical activity without knowing of the considerable implications to the musculoskeletal system due to the disease process Ankylosing Spondylitis. The aspects comport with the relaxed degree of certainty Section 323a enunciated by the Hon. Davis in his 5-7-04 opinion. Dipl. Felder concluded that the plaintiff had Ankylosing Spondylitis & symptomatology as of the 12-5-96 appointment. A 106 p.53, 54 and A 107- 114.

Dr. Waterman's testimony reinforces Dipl.Felder's belief of the disease existence on the date of Dr.Mancall's exam 12-5-96. A57-A71 and A 106, 107

New evidence resulting from a 5-31-05 pelvic area x-ray shows a total destruction of the sacroiliac joints: Source: Hudson Valley Radiology 5-31-05 [3rd Cir.Dkt. #47]

Dr. Waterman MD-Rheumatologist originally considered testifying as a Plaintiff Expert; however, he was barred from doing so by the Veteran's Admin. Hospital counsel. On A. 195, 196 the appellant lists 33 harms caused by Dr. Mancall's breach of duty in the Reconsideration memorandum A. 157 to A. 200 [3rd Circuit APP.]

The damages which flow from the harms are on A. 197. This Reconsideration Memo resulted in another 8/30/04 Order denying the case as per the Appellate Court filing in late July. The order is issued WITHOUT PREJUDICE. A. 0001

7. There is a massive forensic evidence attested to by Diplomate Dr. Felder MD regarding cerebellar atrophy, no analysis of the path of the tension headache, Diplomate Felder's assessment of Diplomate Deng's testimony, the blood sedimentary rate, gross Iritis/blindness in the eye, chronic inflammation and increased calcium formation noted with syndesmophyte formation and sacrum and ilium fused and the fact that the patient is not doing daily exercises to prevent further fusion of the joints due to inactivity. A. 99 to A. 114

Damages which flow from the harms can be reasonably inferred by a jury; A. 197 namely; (taken from Chart 4 of the Reconsideration Memo in the lower court Docket 87 DC 5-21-04 of the 3rd Circuit APP.)

- The patient isn't treating for an inflammation A. 160

- a huge amount of symptomatology is happening A. 120

p. 63 ln.12 onward A. 118 pp. 54 (Ref. are 3rd Cir.APP)

Q. Okay. Back on the record, utilizing Civil Rule 803.18 , which allows the discussion of scientific journal, medical journal type information, given this article Mortality Among Patients with Ankylosing Spondylitis Not Given X-ray Therapy.

This article mentions that these results of 836 patients with Ankylosing Spondylitis investigated indicate , at least in men, ankylosing spondylitis has life-threatening consequences related to many organ systems , consistent with systemic vascular degeneration as one long term consequence of the disease. In addition, mortality risk relative to the general male population was fourfold for all gastrointestinal disease, nearly twofold for accidents, suicide and cerebrovascular disease and 40% in excess for other circulatory diseases." A. 111 p.65-112

A. 134 (article summary)

This is a very critical part of the case because Dr. Mancall noted the Crohns Disease on the face of the Thomas Jefferson University Hospital encounter form . A. 115 (mid-pg. Crohns Disease- diagnosed '91"

Dr. Mancall's only test, an MRI of the Brain showed CEREBELLAR ATROPHY. A. 10 (Report of Dr. David Gerstman MD to Dr. Mancall 2-5-1997 A. 118, 119

" IMPRESSION: 1. CEREBELLAR ATROPHY A119

2. OTHERWISE NEGATIVE MRI SCAN OF THE BRAIN PRE AND POST CONTRAST...

Q. Okay. Dr. Felder, would you agree with the risks that are enunciated in this abstract of the New England Journal of Medicine? A. 134 (i.e. cerebral, suicide etc.)
A. In my opinion, yes.
Q. Okay. And would you agree that the plaintiff had those types of risks during the period 12-5-96 (Dr. Mancall's exam) through 9-5-1999, the date of discovery of ankylosing spondylitis?
A. It would be my opinion yes. A. 111-12 Ref. EADDY
This testimony falls within the relaxed standard of 323a of the Restatement of Torts enunciated in The Honorable Judge Davis's 5-7-04 Order by the Court.
The whole point of the article is what happens WITHOUT TREATMENT of the disease. The risks are: A. 111, A 134

8. Both the Crohns Disease and Cerebellar Atrophy are classic ankylosing spondylitis risks cited in the New England Journal of Medicine
Most importantly, the expert witness testified that he saw no indication that Dr. Mancall analyzed whether or not the cerebellar atrophy was problematic. A. 90, Dr.Mancall failed to analyze the GAIT of the patient by Diplomate Felder's testimony. Omission of the gait review is a classic part of a neurologic exam. A. 91

9. Damages which flow from harms continue on A197
[A 197-199, A118-121; A 301-25, A311 , A109 are the 3rd Cir. APP]
All references in Item 9 are in the 3rd Circuit-APP.
-the patient is wasting valuable money and time on ineffective medications
- a correct diagnosis and treatment would have given the patient an opportunity to prepare for predictable complications of the disease
- the patient is presenting lowered income on Trial Exh. 292-294

Damages which flow from the harms can be reasonably inferred by a jury; A. 197 namely; (taken from Chart 4 of the Reconsideration Memo in the lower court Docket 87 DC 5-21-04)

- The patient is not treating for a dangerous inflammation A. 160 (reproduced in 3rd Circuit APP.)

- a huge amount of symptomatology is happening A. 120 p. 63 ln.12 onward A. 118 pp. 54 ln. 5-21 A121 p. 65 ln.5 thru p.66 (reproduced in 3rd Circuit APP)

Trial Exh 292-296

- the patient cannot plan ahead without a diagnosis and has a 3 yr. career disruption

- patient is suffering random body fluids gyrations-blood sed rate A. 119 p.57-60 (reproduced in 3rd Cir. APP)

Most importantly, the Court should focus on the TJUH encounter form itself.

At the very bottom of the form, Dr. Mancall wrote "Plan MRI, If OK. Fiorinal". A. 115, A, 116 (Quotation)

That's how Dr. Mancall left the encounter form despite a finding of Cerebellar Atrophy and 3 successive memos to him which he read and did not act upon.

A. 301-325-3rd Cir.APP

Leaving an encounter form with no followup is reasonably a considerable basis for a formal admonishment of Dr. Mancall by the Pa. Medical Board.

The only things Dr. Mancall considered in the case are described in his deposition (cited by Diplomate Felder MD): A. 311 pp. 37, 38 (3rd Cir. APP.)

Despite the considerable cross-examination of Mr. Goewert, Esquire, the translation of Dr. Mancall's handwriting by Dr. Mancall himself constitutes the only verifiable things he considered on 12-5-96. [A.50]

A. All right. I wrote OE, which stands for on examination, obese, blood pressure 140/80, mentation check, which means normal, language check, which means normal. Cranial nerves all normal. Fundi check, means normal. Motor strength, bulk , tone, check, which means normal (note obesity). Deep tendon reflexes are two plus, equal Plantars, which is what PI stands for, plantars are downgoing, cerebellar function-normal, sensation normal. Diagnosis chronic tension headache. Rule out intraventricular tumor. Plan MRI. If okay, Fiorinal, return post-MRI. And then that's my signature scrawled out there. by Dr. Mancall A. 50 (Supreme Court APP) There is nothing on Dr. Mancall's encounter form about a postural component. In fact, the evaluation of posture was a key component of Dr. Waterman MD's examination. In addition, this is a BONE disease not an overweight disease.

" I had the opportunity of seeing Mr. Joseph Maresca at the University of Connecticut Division of Rheumatology on 9-8-99. As you are aware, Mr. Maresca is a gentleman with a great deal of musculoskeletal complaints.

In addition, he has a history of inflammatory bowel disease. "

Source: September 15, 1999 memo to Dr. Kellman MD by Dr. Waterman MD A. 67-9 Trial Exhibit 94

10. There is a massive amount of forensic evidence attested to by Diplomate Dr. Felder MD regarding cerebellar atrophy, no analysis of the path of the tension headache, Diplomate Felder's assessment of Diplomate Deng's testimony, the blood sedimentary rate, gross Iritis/blindness in the eye, chronic inflammation and increased calcium formation noted with syndesmophyte formation and sacrum and ilium fused and the fact that the patient is not doing daily exercises to prevent further fusion of the joints due to inactivity. A99-A114

Q. Okay. Dr. Felder, would you agree with the risks that are enunciated in this abstract of the New England Journal of Medicine? A111,A112, A134(ABSTRACT)
A. In my opinion, yes.
Q. Okay. And would you agree that the plaintiff had those types of risks during the period 12-5-96 (Dr. Mancall's exam) through 9-5-1999, the date of discovery of ankylosing spondylitis?
A. It would be my opinion yes.
This testimony falls within the relaxed standard of 323a of the Restatement of Torts enunciated in The Honorable Judge Davis's 5-7-04 Order by the Court.
The whole point of the article is what happens WITHOUT TREATMENT of the disease. A. 134 (ABSTRACT)

11. In fact, the evaluation of posture was a key component of Dr. Waterman MD's examination. In addition, this is a BONE disease not an overweight disease.
" I had the opportunity of seeing Mr. Joseph Maresca at the University of Connecticut Division of Rheumatology on 9-8-99. As you are aware, Mr. Maresca is a gentleman with a great deal of musculoskeletal complaints.

Dr.Bernard Alpers MD-Prof. of Neurology-Jefferson Medical College wrote a book entitled "Clinical Neurology", The Davis Co. 1950 in which he stated:
" The diagnosis (of Ankylosing Spondylitis) is made without difficulty, the stiff spine & back pain being quite distinctive in the early stages and root pains later.
Rule 50 Argument: DC Docket 85

12. Diplomate Felder MD recognizes the musculoskeletal problems as per the deposition of Diplomate Deng-Acupuncturist further memorialized in the Amicus Curiae brief to the Appellate Court and at trial .A33-43

A. I reviewed the records, the deposition of Dr. Elliot Mancall, deposition of Diplomate Deng and the deposition of Dr. John R Waterman MD, which you can see right here. These are--this is what I reviewed. A. 87
Diplomate Felder MD integrated the tension headaches with the Ankylosing Spondylitis in his Trial Testimony. [A. 112 pp. 84]
A. It's my opinion that headaches can be a secondary symptom of ankylosing spondylitis and that the neck is connected to the head, and if a patient has a great deal of cervical neck problems, it can cause tension headaches.
13. Diplomate Felder MD is presented with the 7-28-99 exam of Diplomate Abel MD.
A. Oh, feels like, " iron hand on scalp pulls upward for more than three years duration. A108-9 pp. 59, 60, Trial Exhibit 72, 73 of Diplomate Abel MD A131-2
Q. Okay, Diplomate Felder, is that notation consistent , in your medical opinion, with the existence of Ankylosing Spondylitis? A. Because it's showing limitation of movement and greater than three years duration.
Q. Okay, if you will go down further on the form, there is a notation see rheumatologist to evaluate for autoimmune disease, including blood work-ups.
Would you agree with that assessment by Dr.Carter Abel MD?
A. Yes, I think that's good. A 108 pp. 59, A.109
Q. Why is it a reasonable assessment?
A. Because blood work-ups would help give further information on why you're--you are having symptomatology, such as is stated in Harrison's Textbook of Medicine, looking at HLA-B27 , for example.
[HLA-B27 is a genetic known causality factor which defeats the defendants' claim that the expert witness did not address causality.]

Q. Okay. And also attached to that is the blood work showing the SED rate, the blood sedimentary rate?
A. Yeah
Q. Now, is that a normal SED rate that is being reported.
A. No, it's elevated. The reference range is 30. You had 38.
Q. And is that indicative of--of a more profound problem in the body system?
A. It would be indicative of a problem, yes.
14. Analysis: A.115, A.116
Trial Exhibit 43 is the Thomas Jefferson University encounter form. At the mid-page, the medical student wrote "pulling in stomach c belt lessons pulling of facial muscles which relieves pain". [12-5-96 encounter form]

The significance is that the same "pulling of facial muscles" described in the Thomas Jefferson University encounter form Exh. 43 is still there 3 years later by Diplomate Abel's encounter form except that the pulling is worse. The fact that the pulling is worse flows from Dr.Mancall's non-diagnosis.
A. Oh, feels like iron hand on scalp pulls upward for more than three years duration. A. 108 pp. 59, 60 Trial Exh. 72, 73 of Diplomate Abel A. 132, A. 135

This is a critical aspect because the same pulling of the facial mask is described in both the Thomas Jefferson University encounter form of 12-5-96 and the encounter form of Diplomate Abel MD on 7-28-99.

A reasonable person could conclude that the condition is still there and getting worse due to non-treatment. This would be a classic risk which comports with Sec. 323a of the Restatement of (Second) Torts.
15. Diplomate Felder MD confirmed the relationship between the tension headaches and the Ankylosing Spondylitis in the above.

A. It's my opinion that headaches can be a secondary symptom of ankylosing spondylitis and that the neck is connected to the head, and if a patient has a great deal of cervical neck problems, it can cause headaches. A. 112 pp. 84

From this testimony, a reasonable person could conclude that the problem is still there and getting worse due to non-treatment. The 12-5-96 encounter form of the Thomas Jefferson University Hospital mentions a pulling of the facial muscles. The 7-28-99 encounter form of Diplomate Abel MD mentions "an iron hand on scalp pulls upward for more than 3 years duration" .

The harm which reasonably flows from Dr. Mancall's exam is that the pulling is getting worse without treatment.[Sec. 323a of the Restatement of Torts]

Mr. Goewert, Esq. lead the expert witness, Diplomate Felder MD into another important omission of Dr. Mancall MD.

Q. Do you agree that chronic tension headaches was an appropriate diagnosis.
A. It can be a diagnosis, yes. It's a diagnosis of one of Mr.Maresca's symptoms. A. 113

[A. 126 pp. 85 ln. 16-19 and related reference A. 118 pp. 54 ln. 5-21 from the 3rd Circuit APPENDIX]

Analysis: The witness Diplomate Felder MD recognizes that the other two symptoms are the inability to run or to do a sit-up-up. These two symptoms were not addressed by Dr. Mancall despite the fact that the plaintiff brought a memo to the 12-5-96 visit describing the symptoms. A115, 116 and Trial Exh 49 and A. 124-125

Q. Okay. Dr. Felder, I'm giving you Exh 49, which is a memo prepared by myself and taken to the 12-5-96 encounter with Dr.Mancall to which he has admitted receiving and reading in his deposition. Okay. This letter mentions the permanent restriction in the ability to do sit-ups or to run at maximum speed. A. 96 pg. 32 ln. 11- A.97
A. That is correct, that's what it says.
Q. Diplomate Felder, in your opinion given that type of complaint, what would you do?
A. In my opinion, I would follow up with a patient until there was a specific diagnosis of their condition and/or they were having some improvement in their condition.
Q. Specifically, is there a diagnostic test that you would take to evaluate that complaint?
A. Well , certainly X-rays of the back. Again, one could consider MRI of the sacroiliac region, as per Harrison's Principles of Internal Medicine.
Q. Do you see any evidence on the face of the Thomas Jefferson University encounter form that indicates that Dr.Mancall considered any of those things?
A. I don't see such a thing
Q. And also in-- if you would repeat the diagnostic that you believe should have been taken?
A. The diagnostic test?
Q Yes, that's correct.
A. An MRI of the sacroiliac area, X-rays of the lumbosacral area, blood tests for HLA-B27 could have been possibly taken. (HLA-B27 refers to gene causality)
Q. And , Diplomate Felder, in taking those specific tests, do you believe that any one of those would have led to the discovery of ankylosing spondylitis? A. 97 ln. 20
A. It's my opinion that, yes, that would have given a strong indication.
Q. And could you attach the likelihood that it would have given a strong indication of ankylosing spondylitis?
A. In my opinion, within a reasonable degree of medical certainty, it would have given that in my opinion.

Q. Okay, also in your medical opinion, did Dr.Mancall ever analyze the path of the tension headache or the spinal root distribution?
A. I don't recall that being done. A. 97

16. Analysis:
Clearly, Dr. Mancall formed a working hypothesis of the tension headaches only. He omitted a working hypothesis of the inability to do a sit-up or to run. The appropriate tests to handle this portion of the complaint will have been the back x-rays and MRI of the sacroiliac area to discover the Ankylosing Spondylitis.

The expert is citing the fact that followup is necessary UNTIL IMPROVEMENT. In addition, the expert states that the ankylosing spondylitis would have been discovered with the back x-ray testing which provides a different outcome for the patient as opposed to waiting 3 years for a diagnosis and treatment regimen. A67-69
Dr. Waterman MD finally took the back x-ray 3 years later to discover the ankylosing spondylitis which was there 3 years earlier. Dr.Waterman MD prescribed an anti-inflammatory treatment regimen to reduce inflammation .

A reasonable person would infer that the the non-treatment of the Ankylosing Spondylitis which continued through discovery on 9-15-99 or thereabouts was very substantially within the control of Dr.Mancall such that the patient's risk of harm and actual harm increased.

17. The expert witness confirmed the diagnosis of Ankylosing Spondylitis from a fair reading of Dr. Waterman's testimony; such that, the disease was in place on the 12-5-96 date of Dr. Mancall's examination.

Q. And in reading the deposition of John R Waterman, is it your medical opinion that that deposition reinforces your belief that the existence of ankylosing spondylitis was in place of 12-5-96? Does that reinforce your suspicion that it was in place. A.106 pp. 53
A. It's my opinion that that would be correct.
Q. Okay. Meaning that--if you would elucidate on that?
A. That at the encounter, the original encounter that you had--SOMEONE TOOK MY LETTER--with--let me pull it out here. That on your 12-5-96 visit, you did have, it would be my opinion at that time, point in time, ankylosing spondylitis and symptomatology thereof.
[Note to Court: Diplomate Felder is referring to his 11-22-02 letter-Trial Exh 142-5 A. 135- A.143
Q. Okay. If you would go on pp. 24 of Dr. Waterman's deposition A. 106 pp. 54 to A. 107 (3rd Circuit APP)
A. Yeah
Q. He is talking about the importance of daily exercises?
A. Yes.
Q. Okay. Is it your-would you concur that his conclusion that the patient was not doing daily exercises at that point, would you concur that that was an important element of the patient's treatment?
A. I would concur with what Dr.Waterman is saying here.
Q. Maybe if you could read what he is saying?
A. Starting Line 15 pp. 24 A. 287
Q. Yes.
A. Question, in your examination of the patient, was it obvious to you that the patient was or did you elicit from the patient whether or not he was doing daily exercises, as opposed to periodic exercises?
Answer, I don't think that is noted. Question, was it evident that the patient was doing daily exercise?
A. I should say not. [A reasonable person could construe this as a harm-Note]
Q. Okay, I wanted to draw your attention to another item on pp. 26 line 18 A. 289 A. Yes

Q-- where he's mentioned about turning the head. If you could read ln 18-25
A. --when you examined the patient, did you turn the head from left to right?
Answer, yes. Did you find a normal range of motion?
Answer, no. What did you find?
Answer, decreased cervical range of motion in all directions, both passive and active.
Q. Okay. Diplomate Felder, could you define what decreased cervical range of motion would mean?
A. That would be decreased range of motion in all directions, is what he's saying here, of the neck, of moving your head back and forth, up and down, et cetera.
Q. And, Diplomate Felder, did you ever notice the patient moving his head to the left or to the right personally? Did you ever see the patient's head move left or right?
A. Meaning yourself..
Q. Yes
A. --since I've seen you? No, I haven't seen you do that.
Q. Okay, Do you believe you could rely upon Dr. Waterman's exam?
A. I believe so.
18. Analysis (A. 98- A 103)
Diplomate Felder MD confirmed the diagnosis of Ankylosing Spondylitis by two independent fact witnesses; namely, Diplomate Charles Deng and Dr. John R Waterman MD. Diplomate Felder MD placed this diagnosis squarely within the 12-5-96 examination of Dr. Mancall MD. In addition, the decreased cervical range of motion observations of Dr. Waterman MD mirror Diplomate Deng's findings cited for the 7/96 time period-a full 5 months preceding Dr. Mancall's examination. The harm, according to Dr. Waterman, is that the patient is not doing daily exercises AND DIPLOMATE FELDER AGREES.

The fact that the patient is not doing daily exercises is a harm flowing from Dr.Mancall's non-diagnosis because the patient is not getting the benefit of pain alleviation and an enforced program of moving the joints so that they do not fuse or inflame further from the processes of ossification and calcification by a reasonable person's interpretation or logical inference. Also , the diagnosis, treatment regimen and analysis in Dr. Waterman's deposition may be admissible by the Court because Diplomate Dr. Felder MD stated a general reliance upon Dr.Waterman's exam in its entirety. A. 264 to 300 (deposition of Dr. Waterman MD in 3rd Circuit APP.)
Q. There's a suggestion of multilateral facet fusion. What is that?
A. That's different levels where the facets of the vertebrae are fusing, are coming together very tightly. A. 99
19. Once the expert witness, Diplomate Felder MD, has made an assessment of the ankylosing spondylitis in the 12-5-96 examination time frame of Dr. Mancall MD, the Court cannot substitute its assessment for Diplomate Felder's judgment.
20. A reasonable person could conclude that the treatment regimen for ankylosing spondylitis would attach itself to the diagnosis and untreated symptomatology. How could a reasonable person conclude that the patient was treating for the disease process without a correct diagnosis in place? Until 9/1999, the patient had no basis to know of the disease process ankylosing spondylitis or the alternative treatments available because Dr. Mancall did not make a diagnosis for at least 2/3 of the complaint dealing with the inability to do a sit-up or to run .

Related ref. [A 118 pp. 54 ln. 5-21 ;A. 119 p. 60 ln.19-25
A. 114 p.37 la.9 to p. 39: A.120 p.61 L1-8;
A. 120 p. 63 ln. 12-25 - 3rd Circuit APP.

A. Well, you have a cervical spine with oblique views, with the impression of ossification of the anterior longitudinal ligament, findings consistent with multi-level facet fusion. A differential diagnosis for these findings would include ankylosing spondylitis, as well as other seronegative spondylarthropathies. There's also a lumbosacral spine showing ossification of the anterior longitudinal ligament, mild disk space narrowing, overgrowth in calcifications, fusion of the sacroiliac joints. What's--that's basically it. A. 98

Q. Okay. If you could review for us what is an ossification?

A. It's a bony-a formation--increased bone formation, like from the word ossify.

Q. And what are the implications of that for the patient?

A. Could be chronic inflammation, increased calcium formation.

Q. Diplomate Felder, would you kindly summarize the types of difficulties the patient complained of and that, in your neurologic opinion, you felt were indicative of ankylosing spondylitis? A. 110 p. 63

A. Well, the patient, yourself, had numerous symptoms, rigidity of the head, neck, spine, loss of range of motion, difficulty, for example, using a computer, extensive talking has become difficult for you. Oh, here I did say you developed Iritis on 5-20-1997, yeah. I did apparently note that somewhere. That you've had Crohns disease, it's been exacerbated. You've had tinnitus, which is sounds--a sound of noise in the ears. Difficulty going over in bed, moving around in bed, I should say. Tying your shoes, putting on socks, trembling of hands, feet, occasional feelings you've stated that your body seems to freeze up.

[Clearly, Diplomate Felder MD is quoting from his 11-22-02 expert letter A.135-43 by a fair reading of A. 110-11; Iritis symptoms on A 110 p. 63 ln. 8-17]

In fact the risks were not only there, they were exacerbated!
" I did apparently note that somewhere. That you've had Crohns disease, it's been exacerbated. " A. 110; A135-42
The expert squarely places the ankylosing spondylitis in the 12-5-96 time period and he states that the patient presented with the disease at Dr.Mancall's exam. Therefore, all of the ankylosing spondylitis symptomatology may be inferred by a reasonable person as a risk from Dr. Mancall's exam date on. (12-5-96 to 9/1999)

21. An example of the non-monitoring is as follows:
Q. Now with a finding of cerebellar atrophy, do you see on the TJUH encounter form any evidence that Dr.Mancall came to a conclusion on whether or not the cerebellar atrophy was problematic? A 90-91
A. I can't recall that he did come to that conclusion that it's problematic.
Q. So would it be safe to say that you really--you have no way of knowing what conclusion or what documented conclusion Dr.Mancall came to from looking at the Thomas Jefferson encounter form? A 91
A. That is correct.
Analysis
Clearly, Dr. Mancall MD did not monitor the case-even on the Brain MRI directed to him showing cerebellar atrophy. The bottom of the TJUH encounter form states clearly "Plan MRI, if OK, Fiorinal." Admitted Trial Exhibit 0008 and A. 115- 117

If Dr. Mancall did not make a correct diagnosis, take the correct test or monitor the case- how could a reasonable person believe that the patient has treated for Ankylosing Spondylitis without a diagnosis?

Q. Okay. And would you agree that the patient had those risks during the period 12-5-96 through 9-15-1999, the date of discovery of ankylosing spondylitis?
A. It would be my opinion yes. A. 112 top; A. 134 risks

22. The question is whether or not a reasonable person could conclude that Dr. Mancall failed to exercise reasonable care in the diagnosis and treatment such that this would have been a substantial factor increasing the risk of harm.
[Section 323a of the Restatement (Second) of Torts]

Q. On 12-5-96, did Dr.Mancall make a correct diagnosis?
A. No. It is my opinion, medical opinion, that the correct diagnosis would have been ankylosing spondylitis.
A. 88 pp. 13 ln. 12
Q. What causes you to have that opinion? A. 89
A. A number of problems. First of all, that there was an insidous onset of the condition as per Harrison's Principles of Internal Medicine, duration greater than three months, morning stiffness. There was some improvement with exercise or activity, from what I read in the record of testimony. And the fact that, of course, that the correct diagnosis was achieved by Dr.Waterman MD at a later date. A. 89 to A. 93
[The later date is 3 years later 9/99]
Analysis
A reasonable person could infer that there could be no treatment of ankylosing spondylitis without a firm diagnosis. The firm diagnosis was not made for another 3 years until the correct diagnosis by Dr. Waterman MD. The intervening years until diagnosis left the patient untreated for ankylosing spondylitis. Diplomate Deng's deposition reinforced Diplomate Felder's belief that the ankylosing spondylitis was in place on 12-5-96.

**[The appellant read several pages of Dipl. Deng's testimony into the record. [A. 99 to A. 103]
Diplomate Felder MD placed the Iritis within 6 months after Dr.Mancall's exam and explained that it was an Ankylosing Spondylitis marker. A. 110**

**Q. Diplomate Felder. In reviewing those depositions, what are your findings specifically, & if you could focus on Dr.Mancall's depositions. A . 88 ln. 18; A. 89
[There is a typo in the transcript. Diplomate Deng s/b Diplomate Felder. The correct proceeding is in the Video because the voice is captured as Diplomate Felder MD.]
A. My-after reviewing this, it was my conclusion that the patient's head movements were not examined, nor was the--there to my knowledge, reviewing these documents, in my medical opinion, an examination
of the spine. There was no recollection of the patient's position. There was deficiency of looking at neck posture. There was deficiency in not looking at neck posture. There was no evaluation of the pelvic area. There was no examination to my knowledge of rotation of the thigh. The patient, yourself Mr.Maresca, was given a diagnosis of chronic tension headaches at the time. I reviewed of course Dr.Mancall's testimony and this sheet here, which is the sheet that--from Thomas Jefferson University Hospital physical exam. It's somewhat difficult to read but you know you see motor, deep tendon reflexes.**

Analysis
The insidious onset places the events in the 12-5-96 time frame and the witness cites improvement with exercise which comports with Dr. Waterman's indication that daily exercise is required. Clearly, this insidious onset is untreated without a firm diagnosis, monitoring and treatment. The identified medical student wrote "Headaches @ 7 months duration" at the top of the TJUH encounter form A. 115, 116

On cross-examination, the expert witness, Dr.Felder MD explained that the treatment goal for ankylosing spondylitis is alleviating symptomatology only. A. 113 pg. 110
Q. Would you agree that there's no known medication which has clearly been shown to alter the natural history of the disease (ankylosing spondylitis) ?
A. That's correct.
Q. Okay. A. Its treatment of symptomatology.
Q. You treat symptomatology. A. Yeah.
[since disease is incurable only symptoms can be treated]
23. This is a multiply-dependent expert witness testimony of Diplomate Felder MD dependant upon the plethora of facts gleaned from the deponents Maresca, Mancall MD-defendant, Diplomate Deng-Acupuncturist at Trial 5-4-04 the Trial Exam of Dr.Waterman MD-Rheumatologist on 5-4-04 by Video, the Trial Exam of Dr.Kellman -Internist and treating Internist, Diplomate Felder MD-Neurologist and Expert Witness.Video and transcript The Trial Exhibit Vols 1,2 are on the DC Dock#75-Exhibits 1-300

Reliance by the Diplomate Felder MD on Dipl. Deng's exam is listed on A. 100 and Dr. Waterman's exam A106. In the Rule 50 argument, the plaintiff/appellant quoted from Clinical Neurology by Dr.Bernard Alpers MD-Neurologist - Professor of Neurology of the Jefferson Medical College 1950 Davis Company

" The diagnosis is made without difficulty, the stiff spine and back pain being quite distinctive in the early stages and the root pains later. Exam reveals a stiff, rigid "poker" spine usually in the thoracic & lumbar regions but often affecting the entire spine. The normal lumbar lordosis is lost. The head is thrust forward & the trunk held rigidly in walking. Kyphosis develops, but not in all cases. The spine muscles are held in spasm & become atrophic later in the disease. The disease is usually slowly progressive, though it may cease to progress at any stage. Bony ankylosis develops after 10 to 20 years and pains cease. DC docket 85

24. The plaintiff seeks RELIEF in the form of financial recovery under the MCARE of Pennsylvania allowing for $750T liability coverage consisting of pain and suffering and whatever additional relief a jury will provide for the non-discovery of ankylosing spondylitis and the period of distress from 12/96 to 9/15/99 the reasonable discovery date of the disease & the 2001-06 petitioner's litigation period which interfered with every aspect of life. Pain and suffering relief may be granted in the amount of $250,000 or more together with any other relief that a jury might grant by inferring damages of a permanent nature.

25. Final Disposition of the Case

"The first 10 years of the disease is particularly important with respect to ultimate outcome. " A.113 pg. 114 ln. 21

To accomplish a reasonable settlement of these claims, the Petitioner asks that the Supreme Court send the case back to the Appellate Court for further arguments or to the District Court of East. Pennsylvania for a new trial with possible instruction on the use of Eaddy's 694 at the Plaintiff's Conclusion of the Case in Chief or a clearer definition of what constitutes a reasonable interpretation of obviousness and unobviousness under the Pennsylvania law. The Supreme Court could send the case back to the Court of Common Pleas in Philadelphia where it was filed originally. The Thomas Jefferson University Hospital moved the case to the federal jurisdiction on the pretext of diversity; however, the State courts have the in depth knowledge of the law. The defendants moved the case to a federal jurisdiction because federal juries tend to be selected from all over Pennsylvania and ;resultingly, somewhat less money has been awarded to plaintiffs than a jury of peers in Philadelphia. At trial, the plaintiff will amend the video trial testimony and /or confront the defendants with a rigorous discussion of the Expert Letter of Diplomate Felder which contains many details on treatment and damage rationales.

In addition, the plaintiff will request that a new Trial Court provide a better audit trail to the evidence entered.

APPENDIX

BOOK I:

OPINIONS BELOW: A. 1 to A 27

A.1 8-30-04 order DENYING Motion for Reconsideration WITHOUT PREJUDICE by the DC Court

A.2.to A.14 5-10-04 Order granting Motion as a Matter of Law -Civil Rule 50 to Defendants

A.15 -A.16 Substantial Deviation from good juridical practices

A.17-A.18 Relevant portions of the DC Docket

A.19-23 Not Precedential 6-16-05 opinion of the 3rd Circuit Court of Appeals by Garth

A.24 Denial of Petition for Rehearing 12-19-05

A.25 3rd Circuit Court of Appeals Docket 1-21

SUBSTANTIAL DEVIATION JUSTIFYING THE SUPREME COURT REVIEW A. 15 , A.16, A.23

11th Amendment-suits in equity are tried in State Courts not federal courts. 1795.

APPENDIX

BOOK 2

A.135-A143	Dr.Felder MD-Neurologist expert letter sequences read in the trial exam and affirmed at the end of the trial exam.
A.83-A143	Trial Exam of Diplomate Felder MD-Neurologist and Psychiatrist
	The above multiply depends on the following testimonies:
A28-A32	Plaintiff testimony on range of motion issues and demonstrations to Dr.Mancall on 12-5-96.
A.33-A43	Authenticating trial exam and Amicus Curiae brief of Diplomate Deng-Acupuncturist which demonstrates range of motion issues 7/1996.
A44-A54	Dr.Mancall's plausibly deniable statements on all range of motion issues existing 12-5-96
A57-A71	Trial exam of Dr.Waterman MD-Rheumatologist at UCONN now working at Newington V.A. Hospital
A70-1	Spinal x-ray exams of Dr.Waterman 9-9-1999
A72-A89	Trial Exam of Dr.Kellman MD-Internist who treated the patient for significant back inflammations after Dr.Waterman's diagnosis
A144-60	Testimony of Dr.Lee MD,PhD read at trial confirming the disease process Ankylosing Spondylitis and the treatment modalities including comparison x-rays and Schober tests of spinal flexion from the dimples of Venus

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Joseph S. Maresca, CIVIL ACTION
PLAINTIFF

v.

Elliot L Mancall MD and
Thomas Jefferson University Hospital
DEFENDANTS

ORDER

And now, this 30th day of August, 2004, upon consideration of the Motion for Extension of Time filed by Plaintiff on Aug. 5, 2004 (Doc. 95), it is hereby ordered that the Motion for Reconsideration is DENIED without prejudice. Because Petitioner filed a Notice of Appeal, the Court lacks jurisdiction to entertain this Motion for Extension of Time. Petitioner is directed to file said Motion and all subsequent motions with the Court of Appeals.

By The Court

Legrome D. Davis, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF PENNSYLVANIA
JOSEPH S. MARESCA CIVIL ACTION
Plaintiff
v.
ELLIOT L MANCALL, MD AND
THOMAS JEFFERSON UNIVERSITY
HOSPITAL
DEFENDANTS

ORDER

1. INTRODUCTION

Presently before the Court are the Motion for Judgment as a Matter of Law filed by THOMAS JEFFERSON UNIVERSITY HOSPITAL ("TJUH") on April 26,2004 (Doc. 79), the Opposition to the Motion for Judgment as a Matter of Law filed by Plaintiff -Joseph S. Maresca (Plaintiff) on May 3, 2004 (Doc. No. 83) , the Motion for Judgment as a Matter of Law filed by Defendant Elliot L Mancall MD (Dr. Mancall) on April 28, 2004 (Doc. 80) and the Opposition to the Motion for Judgment as a Matter of Law filed by Plaintiff on May 3, 2004 (Doc. 84)

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff, proceeding pro se, initiated this medical malpractice action in state court in September 2001 against Dr.Mancall and TJUH (together "Defendants"). After the action was removed to this Court by Defendants, Plaintiff filed a Complaint on February 14, 2002, generally alleging that he was examined by Dr. Mancall on or about December 5, 1996, that he was at that time suffering from particular symptoms which Dr.Mancall should have recognized as corresponding to a medical condition called Ankylosing Spondylitis; that Dr.Mancall failed to diagnose his condition; that he did not realize that he suffered from ankylosing spondylitis until over two years later, and that Dr.Mancall's failure to diagnose his condition resulted in his continued suffering from the condition and the further progression of the condition. [1] The Complaint can be fairly read to set forth three claims: (1) a medical malpractice claim against Dr. Mancall based on his alleged failure to diagnose Plaintiff's condition, (2) a claim against TJUH alleging vicarious liability for Dr.Mancall's actions based upon the theory of respondeat superior, and (3) a claim against TJUH based upon the doctrine of corporate negligence.

During discovery, the Plaintiff provided two pre-trial reports from a neurologist, Mitchell S. Felder MD, his only medical expert witness. On the basis of these reports, the Court denied summary judgment to both defendants on 6-20-2003.

Footnote :

1. Ankylosing Spondylitis is a chronic form of arthritis that affects the spine, causing pain, stiffness,swelling, and limited motion in the back, neck, and hips. WJ Koopman, ed. ARTHRITIS AND ALLIED CONDITIONS: A TEXTBOOK OF RHEUMATOLOGY, 14th edition, vol. 1, 1312-1323

(Doc. 047). 2 The parties attended a final pretrial conference on December 11, 2003 (Doc 52). At the second pretrial conference and hearing on May 3, 2004, the Court heard argument on the Defendants' motions filed pursuant to Rule 50 of the Federal Rules of Civil Procedure and concluded that, because trial had not yet commenced, the motions were untimely. At the close of Plaintiff's case, Defendants renewed the motions for judgment as a matter of law. The Court heard oral argument on 5- 5, 2004. Hrg.Tr.2

III. STANDARD OF REVIEW

A motion for judgment as a matter of law should be granted only if, "viewing the evidence in the light most favorable to the non-movant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability." Gagliardo v. Connaught Laboratories, Inc. 311 F.3d 565, 568, (3rd Cir. 2002) (quoting Fulz v Dunn 165 F.3d 215, 218 (3d Cir. 1998); see Hrg. Tr . at 11 (explaining the standard of review for judgment as a matter of law to Plaintiff.) "Although a scintilla of evidence is not enough to withstand a motion for judgment as a matter of law, the denial of a motion for judgment as a matter of law is proper unless the record "is critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." Denneny v. Siegel, 407 F 2d 433, 439-40 (3rd Cir. 1969)(citations omitted). The court is not free to weigh the evidence or to pass on the credibility of witnesses or to substitute its judgment of the facts for that of a jury. Lightning Lube v. Witco Corp., 802 F. Supp. 1180, 1885 (D.N.J. 1992) aff'd by 4 F.3d 1153 (3d Cir. 1993).

Footnote :

2. At all stages of the litigation, the Court made every effort to insure that Plaintiff understood the difference between evidence submitted to withstand summary judgment and the burden of proof at trial. See eg.Hrg. Tr. at 9-10,14-15

A case may not be taken away from the jury merely because of speculation and conjecture is required" when facts are in dispute and fair-minded individuals may draw differing inferences." Lavender v. Kurn, 327 U.S. 645, 653 (1946)). The motion must be denied "if there is evidence reasonably tending to support the recovery by the plaintiff as to any of his theories of liability." Hofkin v. Provident Life and Accident Ins. Co., 81 F. 3rd 365, 369 (3rd Cir. 1996).

IV ANALYSIS

A. Plaintiff Cannot Establish a Prima Facie Case of Medical Malpractice Against Dr.Mancall

In order to establish a prima facie cause of action for medical malpractice, a plaintiff must demonstrate that " (1) the physician owed a duty to the patient; (2) the physician breached that duty (3) the breach of duty was the proximate cause of, or substantial factor in, bringing about the harm suffered by the patient, and (4) the damages suffered by the patient were the direct result of that harm. "Billman v. Saylor, 761 A 2d 1208, 1211-12 (Pa. Super. 2000) quoting Eaddy v. Hamaty, 694 A 2d 639, 642 (Pa. Super. 1997). Because "the complexities of the human body place questions as to the cause of pain or injury beyond the knowledge of the average layperson," a medical malpractice plaintiff generally must produce the opinion of a medical expert to demonstrate the elements of his cause of action.

Masgai v. Franklin , 787 A 2d 982, 985 (Pa. Super 2001) citing Miller v. Sacred Heart Hosp., 753 A 2d 829, 833 (Pa. Super. 2000) (Quoting Hamil v. Bashline, 481 Pa. 256 , 392 A 2d 1280, 1285 (1978). 3

1. Expert Testimony of Dr.Felder Insufficient to Establish Deviation from Medical Standard of Care

To support his medical malpractice case against Dr.Mancall, Plaintiff presented, via videotape trial testimony, the expert medical testimony of Mitchell S. Felder MD. In medical malpractice actions, the expert witness must testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered. Mitzelfelt v. Kamrin 526 Pa. 54, 62, 584 A 2d 888, 892 (Pa. 1990) citing Brannan v. Lakenau Hospital, 490 Pa. 588, 417 A 2d 196 (1980); Eaddy v. Hamaty, 694 A 2d 639, 642 (Pa. Super. 1997); Hrg. Tr at 22-23. An expert need not testify with absolute certainty or rule out all possible causes of a condition, nor must the expert testify in precisely the language used to enunciate the legal standard. Id.; In re Jones, 432 Pa. 44, 246 A 2d 356 (1968)(medical testimony need not conform to precise statutory definitions). Instead, the Court reviews the expert testimony in its entirety to assess whether it expresses the requisite degree of medical certainty.

Footnote 3:
The doctrine of res ipsa loquitor under which expert testimony is not required to establish a breach of duty "'where the matter under investigation is so simple, and the lack of skill so obvious, as to be within the range of the ordinary experience and comprehension of non-professional persons." is inapplicable to this case. Id at n. 11, 698 A 2d at 585 n. 11 (quoting Chandler v. Cook, 438 Pa. 447, 451 n 1265 A 2d 794, 796 n.1 ('70); see Toogood v. Rogal. 573 Pa 245 , 256-7, 824 A 2d 1140, 1146-47(E.D. Pa 2003); Hightower-Warren v. Silk, 548 Pa. 459, 463-4, 698 A 2d 52, 54-55(1997). The allegations made against both Dr. Mancall and TJUH are well beyond the knowledge of average lay people. Hrg. Tr. at 8-9

McCann v. Amy Joy Donut Shops, 325 Pa. Super 340, 343-44, 472 A 2d 1149, 1151 (1984) (en banc) In this case Dr.Felder testified only that, though Plaintiff complained only of headaches, Dr.Mancall failed to examine the patient's head movements or conduct examination of the spine, neck posture, pelvis, and thigh rotation. Test. Tr. at 12-14; Hrg. Tr. at 22. Dr.Felder offered his medical opinion that, on the basis of the symptoms presented by the Plaintiff, the appropriate diagnosis would have been ankylosing spondylitis. Id. On direct examination, Dr.Felder suggests numerous examinations that Dr.Mancall could have taken to yield such a diagnosis, Id. at 16-20. Finally, Dr.Felder testified that in his opinion, a doctor should respond to written correspondence from a patient and should followup with that patient. Id at 24-25, 53-54; Hrg. Tr at 24, 31

But Dr.Felder later retreated from that position during cross-examination, conceding that his opinion resulted from medical information not available to Dr.Mancall at the time of his diagnosis; the examination conducted by Dr.Mancall yielded an appropriate diagnosis of chronic tension headaches; nothing in Dr.Mancall's record of 12-5-96 or in subsequent letters from Plaintiff to Dr.Mancall indicated a history of complaint of progressive neck stiffness or pain by Plaintiff; Dr.Mancall's request for an MRI and prescription for medication were appropriate; some subsequent efforts by Dr.Mancall to followup were indicated by the record; and the information available to Dr.Mancall would not suggest the need for a back examination.

Id. at 85-86, 92, 96-7; Hrg. Tr. at 25. When reviewed in its entirety, the testimony fails to express the requisite degree of medical certainty as to a failure by Dr.Mancall to perform his examination within the requisite standard of care.

2.Expert Testimony of Dr.Felder Fails to Establish Causation

But, even if, when viewed in the light most favorable to the non-movant, this testimony could be viewed by a reasonable jury to indicate that Dr.Mancall deviated from some medical standard of appropriate care, the necessary showing of causation is totally absent. In addition to proving that the defendant breached a duty owed, the Plaintiff must also establish that the breach of said duty was the proximate cause of bringing about the harm suffered by the Plaintiff. Joyce v. Boulevard Physical Therapy & Rehabilitation Center, P.C. 694 A 2d 648, 657 (Pa.Super, 1997)
"An expert fails this standard of certainty if he testifies "that the alleged cause "possibly" or "could have" led the result, that "it could very probably account" for the result, or even that it was "very highly probable" that it caused the result.

Kravinsky v. Glover 263 Pa. Super. 8, 21, 396 A 2d. 1349, 1356 (1979) citations omitted; Hrg. Tr. at 25
At no point did Dr.Felder assert that Dr.Mancall could have prevented or cured Plaintiff's condition had he diagnosed it earlier. Rather, Dr.Felder acknowledged no cure, definitive treatment, or medication exists for ankylosing spondylitis that can alter the natural progression of the disease. Test. Tr. at 110; Hrg. Tr at 26-27.

During oral argument on the motions before the Court on 5-5-04, in response to the Court's request that Plaintiff point to any instance in the expert witness' testimony where causation had been remotely discussed. Plaintiff instead read from treatises, pointed to exhibits not in evidence, & conjectured about testimony he expected to elicit from defense witnesses. Hrg. at 37-47. Therefore, Plaintiff failed to establish that Dr.Mancall's allegedly negligent treatment was the proximate cause of his subsequent condition of ankylosing spondylitis and its related symptoms.

However, in medical malpractice actions involving incurable illnesses, because a causal connection between the care provided by a physician and the resulting injury can often not be established to such a reasonable degree of medical certainty, the Court requires only that the treating physician's negligence was a substantial factor in causing Plaintiff's injury. Joyce 694 A 2d at 657. [4] In such cases, we require only that the treating physician's negligence was a substantial factor in causing plaintiff's injury.

Footnote 4: In cases where irrespective of the quality of the medical treatment, a certain percentage of patients will suffer harm, the standard of proof regarding medical expert testimony is " an impossible standard." Mitzelfelt at 62. In such instances, the Plaintiff must show "to a reasonable degree of medical certainty that the physician's actions/ omissions increased the risk of harm" in order to proceed to the jury. Billman 761 A 2d at 1213 citing Montgomery v. S. Phil. Medical Group Inc. 441 Pa Super, 146, 656 A. 2d 1385 (1995)(Following testimony of a physician's act or omission that "increased the risk that the plaintiff would have either a shortened life expectancy or suffered harm," a jury may consider whether "the acts or omissions of the physician were a substantial factor in bringing about the harm."). The Court notes that in Penn. this relaxed standard has traditionnally been applied to cancer patients for whom early detection can be lifesaving. It hasn't generally been applied to to degenerative illnesses for which no cure or treatment meaningfully alters the disease progression.

ID Accordingly, if a plaintiff has proven that the physician's breach increased the risk of harm, then there is sufficient evidence to overcome a motion for judgment as a matter of law. Id see Montgomery v. South Philadelphia Medical Group, Inc. 441 Pa. Super. 146, 656 A 2d 1385 (1995) ; Clayton v. Sabeh, 406 Pa. Super 335, 594 A 2d 365 (1991) The expert in cases of this nature has been permitted to testify under the relaxed degree of certainty enunciated in Sec. 323(a) of the Restatement (Second) of Torts, that the defendant's failure to exercise reasonable care in the diagnosis and treatment was a substantial factor that increased the risk of harm. Eaddy 694 A 2d at 642 citing Billman, 761 A 2d at 1212-1213. In fact, Dr.Felder never articulated any difference that would have resulted in Plaintiff's ultimate prognosis had Dr.Mancall diagnosed him on December 5, 1996 or any injuries that resulted from Dr.Mancall's alleged mis-diagnosis. During oral argument, Plaintiff pointed only to Dr.Felder's tenuous conclusion that his Crohns disease had been exacerbated without any connection between that exacerbation and Dr.Mancall's diagnosis. Test Tr. at 63; Hrg. Tr. at 33 As a result Dr.Felder's critically deficient expert testimony, Plaintiff has failed to establish that the care Dr.Mancall provided was a factor in causing or increasing the risk of his illness such that a reasonable jury could find in his favor. Hrg. Tr. at 56-58

B. Plaintiff Cannot Establish a Prima Facie Case of Vicarious Liability Against Thomas Jefferson Univ. Hospital

Because Plaintiff fails to establish that Dr.Mancall caused his alleged injuries, any claim of vicarious liability against TJUH must likewise fail. The Pennsylvania Supreme Court has held that because "the corporate hospital of today has assumed the role of a comprehensive health center," it may be subject to theories under respondeat superior, ostensible agency, and/or corporate negligence. Thompson v. Nason Hospital, 527 Pa 330, 338-40, 591 A 2nd 703, 706-7 (1991)

In order to find liability on the part of the TJUH under a theory of respondeat superior, Plaintiff must establish that Dr.Mancall was an agent of the hospital and liable for the injuries claimed. Hannis v. Ashland State General Hospital 123 Pa. Cmwlth., 390, 397, 554 A 2d, 574, 578 (Pa Cmwlth 1989) citing Capan v.Divine Providence Hospital, 287 Pa. Superior Ct., 364, 430 A 2d 647 (1980). An agency relationship results from (1) the manifestation of consent of one person to another that (2) the other shall act on his behalf and subject to his control, and (3) consent by the other so to act: Id. at 414 citing Chalupiak v. Stahlman, 368 Pa. 83, 81 A 2d 577 (1951); Restatement (Second) Agency Par 1(1) (1958). Only an agreement for the creation of a fiduciary relationship with control by the beneficiary creates such an agency. Rosenberg v. Cohen, 370 Pa. 507, 88 A 2d 707 (1952). At oral argument, though Plaintiff points to the presence of the TJUH logo on the encounter form completed by Dr.Mancall that does not suffice to establish an agency relationship. Hrg. Tr. at 11-15, 18-21; Tr. 43

Not only is there no evidence of record that creates an agency relationship, plaintiff fails to establish his claim of negligence as a matter of law against Dr.Mancall. As such, the claim of vicarious liability against TJUH cannot succeed.

C. Plaintiff Fails to Establish a Corporate Liability Claim Against Thomas Jefferson University Hospital

Similarly, a corporate liability claim cannot be sustained against Thomas Jefferson University Hospital. With respect to corporate negligence, the Pennsylvania Supreme Court explained that:

> Corporate negligence is a doctrine under which the hospital is liable if it fails to uphold the proper standard of care owed the patient, which is to ensure the patient's safety and well-being while in the hospital. This theory of liability creates a non-delegable duty which the hospital owes directly to the patient. Therefore, an injured party does not have to rely on and establish the negligence of a third party.
> Thompson, 527 Pa. at 338, 591 A 2d 707 (footnote is omitted).

The hospital's duties have been classified into four categories:
(1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care, and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients. . Id. (citations omitted); Hrg. at Tr. at 4.

To establish a prima facie case of corporate negligence, the plaintiff must prove: (1) one or more of the aforementioned duties of care; (2) the hospital had actual or constructive notice of the defects or procedures that created the harm; and (3) that the conduct was a substantial factor in bringing about the harm. See Whittington v. Episcopal Hospital., 768 A 2d 1144, 1149-50 (Pa. Super 2001). As with a claim of medical malpractice, a claim of corporate negligence requires that "the plaintiff present expert testimony that the hospital's acts deviated from an accepted standard of care and that the deviation was a substantial factor in causing plaintiff's harm." Welsh v. Bulgar, 548 Pa. 504, 51214, 698 A 2nd 581, 585 (1997); Hrg. at 5. Dr.Felder, Plaintiff's only expert never concludes, suggests or in any way insinuates that TJUH breached a standard of care. Doc 78 at 4 see generally Dep. Tr. Hrg. Tr. at 6. At no point does Dr.Felder mention any duty breach of that duty, or any negligent conduct on the part of TJUH. Id; Hrg. Tr. at 7. Further, when asked by the Court what if anything. Dr.Felder concluded with respect to the duty of care owed and allegedly breached by TJUH, Plaintiff could point to nothing in the videotape trial testimony transcript or any evidence he presented. Id. at 17-8, 20-21. The only tenuous connection, the encounter form,

does not remotely suggest that TJUH comported itself in a way that deviated from an accepted standard of care such that its deviation was a substantial factor in causing Plaintiff's harm. Id. As such, the corporate negligence claim fails.

V. CONCLUSION

For all of these reasons, the Motion as a Matter of Law filed by Thomas Jefferson University Hospital ("TJUH") (Doc. 79) and the Motion for Judgment as a Matter of Law filed by Defendant Elliot L Mancall, MD ("Dr.Mancall") (Doc 80) are GRANTED.

BY THE COURT

/script LDD

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Legrome D.Davis Jr.

Substantial Deviation from Good Juridical Practices,
Errors by the DC Level & Appellate 3rd Cir: also A171-2

Departures from Accepted Practice and Errors Are:
DC Court-Eastern Pa.-The Honorable Legrome Davis
Case 01-5355 Dismissed without prejudice 8-30-04
Details Follow:
The Court did not understand that an Ankylosing Spondylitis claim is MINE-Medical Improvement Not Indicated by SSA DI 280 40.001 Par. 416.99. The 5-10-04 dismissal as a Rule 50 Matter of Law spent much time opining on the lack of causation. The federal law defines the disease process as incurable. The 3rd Circuit Appeals doesn't have a stare decisis on Ankylosing Spondylitis;however, the 5th Circuit 95-60433 by CHIEF: POLITZ: pp. vi defines the disease, its causality and major manifestations. The expert witness-Diplomate Felder MD-Neurologist made it abundantly clear that symptomatology is the treatment goal. A.113 pg. 110 ln. 20 onward
On A. 96, the expert witness explained that Dr.Mancall had knowledge of the extreme musculoskeletal limitations. [A. 96 pp. 32, 33; A.97 through A. 128] The DC erred. The Trial Court asked the parties to keep the trial under 3 weeks. This request caused economies in the presentation that precluded a proper presentation for a Pro-se litigant. The Court never considered Brophy v. Brizuela-criteria of OBVIOUSNESS opined by Diplomate Deng in an Amicus Curiae Brief to the 3rd Circuit and 5-4-04 appearance at trial. A. 33-43 -Appellate Docket: 22 Metzelfelt may be applied when a case is UNOBVIOUS. Neither Metzelfelt nor Brophy v. Brizuela provide any uniform method of determining UNOBVIOUSNESS. Therefore, the law is murky at best by "Felder v.Casey" and classic federal rights are abridged pertaining to the 1st, 7th, 14th and 21st amendments. The Court confused causality of the disease process which is incurable with the relationship between the negligence and the harm to the patient by any common sense rationale. A171-A172

The case was originally filed on or about 9-7-2001 in the Court of Common Pleas in Philadelphia. It was transferred to the DC for Eastern Pa.under a "diversity" ruling; however, the in depth knowledge of the Pennsylvania statutes resides in the Court of Common Pleas. The case was transferred out by O'Brien & Ryan(TJUH) under the guise of "diversity" because federal juries are drawn statewide. This wider sampling results in lower jury awards because suburban jurists tend to award less money than Philadelphia juries. DC Docket 1-6
Docket 6 is a DENIAL for REMAND by The Hon. Schiller. This farming of cases from the Court of Common Pleas to the federal jurisdiction clogs the federal dockets without any rational cause except to save insurers money.
The Petitioner was DENIED an Order to Compel the TJUH to produce the testimony on the federal law requirement for a Compliance Officer as per Fed.Register Vol.63 #35 MONDAY 2-23-1998 P. 8990. On 2-10-03, Dean Nasca of the Jeff Medical College testified to a House Committee that the clinical revenues of the physician practice derived from the payments to Dr.Mancall) subsidize the college teaching. This may have caused the lack of follow-up by Dr.Mancall and his unknown medical student.

The DC Court approved many Trial Exhibits offered as evidence during trial; however, it is not clear whether or not the Court prepared and audited the evidence forms. see- xvi
The Appellate Court did not apply EADDYS at 694 which is the relaxed standard on the connection of risk to the physician negligence Ankylosing Spondylitis, like cancer, is highly treatable if discovered early. "Overall, the first 10 years of disease is particularly important with respect to subsequent outcome." A. 113 Pg. 114 ln. 21
The Amicus Curiae Brief of Diplomate Deng was not awarded sufficient weight despite the fact that it proves the musculoskeletal issues during July of 1996. In addition, the Appellate Court did not understand the inapplicability of causality to Ankylosing Spondylitis. A. 33 to A. 43

Relevant Portions of the District Court Docket
Pertinent to a United States Supreme Court Review

The following portion of the District Court docket of Case 01-5355 in the District Court were carried forward for review in Case 04-3133 in the 3rd Circuit Court of Appeals. The Appellant pro-se requests that the United States Supreme Court review these portions of the DC docket at such time as this case is taken up for review at the Writ of Certiorari stage or during and subsequent to any oral arguments scheduled.

Docket #	Contents
6	Order DENYING plaintiff's remand of the case back to the Court of Common Pleas where the case was filed originally
12	Complaint
23	Case reassignment from Judge Schiller to Judge Davis
26	Motion to Compel testimony of TJUH
27	Expert letters including 11-22-02 letter of Diplomate Felder MD faxed to Court Chambers of Judge Davis Trial Exhibits 142-145
32	1-13-02 Partial Summary Judgment lack of audit trail of medical record due to medical student not listed (allegedly took the medical history)
38	Plaintiff Summary Judgment Opposition -approved and trial scheduled
45-47	Plaintiff Opposition to Defendant SJ and Court Order Denying Defendants SJ
59,64,65,69-73	Motions in Limine
64	Plaintiff requests Court to de-Classify Daubert criteria and accept obviousness of the disease process ankylosing spondylitis

Docket #	Contents
74	Trial exam transcripts and video for Diplomate Felder MD-Plaintiff Expert
75	Trial Exhibits 1-300 of Plaintiff
76	Trial Exam of Dr.Kellman MD-Internist treating physician with transcript & video
77	Exhibits 91-96 for Trial and transcripts plus video of Dr.Waterman MD-Rheum. from the UCONN
83,84	Opposition Motions by Plaintiff to a Defendants' series of Motions to Dismiss as a Matter of Law
85	Rule 50 transcript of proceedings
86	Granting of Motions as a Matter of Law
87	Plaintiff's Request for Reconsideration
90	Denial of Motion for Reconsideration
92 on	Final Denial of Motion for Reconsideration WITHOUT PREJUDICE and Court states that it is too late to act since the issue has been joined in the Appellate Court
	(34 page brief with tables separately itemizing defendant's breaches, causal connections etc.

United States Court of Appeals 3rd Circuit
Case No. 04-3103
NOT PRECEDENTIAL

Joseph S. Maresca- Appellant Pro Se

v.

Elliot L Mancall MD and
the Thomas Jefferson University Hospital-Appellees

On Appeal from the United States District Court for Eastern District of Pennsylvania DC Civil 01 cv 5355
District Judge-The Honorable Legrome D. Davis

Submitted Under Third Circuit L.A.R. 34.1a 6-8-2005
Filed 6-16-05
Before : Rendell, Fuentes and Garth, Circuit Judges

Opinion

Joseph S. Maresca appeals from the District Court's order granting judgment as a matter of law in favor of the Defendants in this action alleging medical malpractice. For the following reasons, we will affirm the District Court's order. On 12-5-96, Joseph Maresca consulted Dr. Elliot L Mancall, a licensed neurologist in Philadelphia.

Dr. Mancall examined Maresca, diagnosed him with chronic headaches, and prescribed a muscle relaxant. In Sept., 1999, nearly three years later, a rheumatologist diagnosed Maresca with ankylosing spondylitis (AS) for which he continues to receive treatment. Maresca filed a pro-se complaint in the Court of Common Pleas of Philadelphia County against Dr.Mancall and Thomas Jefferson University Hospital alleging medical malpractice based on the failure to diagnose AS or followup after the office visit in 1996. The Defendants removed the case to the District Court, and following discovery, moved for summary judgment. The District Court denied the Defendants motion for summary judgment, and the matter was calendared for trial by jury. In preparation for trial, the parties videotaped the testimony of Maresca's sole medical expert, Dr. Mitchell S. Felder. At the close of Maresca's case-in-chief, the Defendants renewed their previously filed Motions for Judgment As A Matter of Law under Federal Rule Civil P. 50. The Defendants argued that Dr. Felder failed to offer expert testimony from which the jury could conclude that the defendants breached a standard of care or caused any injury to Maresca.
We have appellate jurisdiction under 28 U.S.C. Par 1291.
We exercise plenary review over the District Court's decision to grant judgment as a matter of law.

See La Verdure v. County of Montgomery , 324 F.3d 123, 125 3d Cir. 2003).

> A court should grant such a motion only ' if , viewing the evidence in the light most favorable to the nonmovant & giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability. "
> Northview Motors Inc. v. Chrysler Motors 227 F . 3d 78, 88 (3rd Circuit 2000)
> (quoting Lightning Lube, Inc. v. Witco Corp., 4 F. 3d 1153, 1166 (3d Cir'93)

After conducting a lengthy hearing, the District Court agreed and subsequently denied Maresca's timely motion for reconsideration. Maresca appeals. In Pennsylvania, a plaintiff seeking damages for medical malpractice must "establish" a duty owed by the physician to the patient, a breach of that duty by the physician, that the breach was the proximate cause of the harm suffered, and that the damages suffered were a direct result of the harm. "

Too good v. Rogal , 824 A 2nd 1140, 1145 (Pa. 2003)

To establish a breach and causation, a plaintiff must present an expert witness who will testify, to a reasonable degree of medical certainty of the breach and proximate cause.

Metzelfelt v. Kamrin, 584 A 2nd 888, 892 (Pa. 1990)

We have reviewed the testimony of Maresca's sole medical expert in its entirety and agree with the District Court that his testimony does not satisfy these requirements. Dr.Felder did not articulate an opinion to any degree of medical certainty that either Dr.Mancall or the hospital breached any standard of care or caused harm to Maresca. In the absence of such testimony, the District Court was bound to grant judgment as a matter of law in Defendants' favor which we affirm as follows:

And now this 7 day of May 2004, it is hereby ORDERED that the Motion for Judgment as a Matter of Law filed by Thomas Jefferson University Hospital ("TJUH") (Doc. No. 79) and the Motion for Judgment as a Matter of Law filed by Defendant Elliot L Mancall ("Dr.Mancall") (Doc. 80) are granted with prejudice. Pursuant to Rule 41. 1(b) Local Rules of Civil Procedure, it is further ordered that this matter be dismissed with prejudice . The Clerk of the Court is directed to statistically close this matter.

The grant of summary judgment and dismissal of the complaint are inconsistent. Cheminor Drugs Ltd. v. Ethyl Corp. 168 F. 3d 119, 121n 2(3d Cir. 1999) In any event, see Local Rule of Civil Procedure of the Eastern District 41.1(b)

In the absence of such testimony, the District Court was bound to grant Judgment as a Matter of Law in the Defendant's favor.

We are aware of Maresca's continued attempts to rely on Dr.Felder's report dated 11-22-2002. We are also aware that the District Court also repeatedly informed Maresca that Dr.Felder's report , while sufficient to defeat the Defendant's Motion for Summary Judgment was never admitted into the trial record and thus could not be considered by the jury. At bottom, regardless of what his report states, Dr.Felder's testimony did not provide sufficient evidence from which the jury could have found in Maresca's favor on two essential elements of his claim. For these reasons, we affirm the District Court's order granting judgment as a matter of law in favor of the Defendant's. We deny the motion by Charles Deng pertaining to settlement rather than adjudicated cases. Proceed as amicus curiae. Fed. R P. 29 (b) Neontology Associates 293 F. 3d 128 (3rd Cir. 2002)

Substantial Deviation from Good Juridical Practices by the Appellate 3rd Circuit 04-3103 Rendell, Fuentes, Garth

The the case was transferred wrongly from the Court of Common Pleas, Phil. to the District Court-E. Pa. under the guise of "diversity" and in direct variance with the spirit of the 11th Amendment which limits automatic jurisdiction of federal courts to automatically hear cases including citizens between states as in this case. DC Docket 1 onward. The 11th amendment was designed to prevent a citizen from one state from bringing suit against another in federal court. Art. 3 Sec.2 modified; Chisholm v.Georgia 2 U.S.419 1793

The Appellate Court failed to give due consideration to EADDY at 694 which requires only a causal connection between the risks and the physician's harm. EADDY 694 has been applied to cancer cases ; however, there is application here because the Petitioner is alive 10 years after the first symptomatology on 12-5-96. In medicine, management of a disease process 5 years after discovery is considered in the nature of a cure. On A. 113, Diplomate Felder testified that the treatment goal is to alleviate symptoms and that " the first 10 years of disease is particularly important with respect to subsequent outcome." The work Diplomate Felder MD-Neurologist performed is on A.87 to A. 114. The tremendous risks of stroke, vascular problems and suicide are outlined on A. 134- a professional literature reference from the New England Journal of Medicine. Diplomate Felder affirmed conclusions in a 11-22-02 letter. " I would say I still hold those conclusions"A.113,A135-43 The expert witness affirmed that the Petitioner had the considerable risks of non-treatment for ankylosing spon. from 12-5-96 (the date of Dr.Mancall's exam) to 9-15-99, the date of discovery of the ankylosing spondylitis. The Petitioner brought a memo to Dr.Mancall on 12-5-96 describing the inability to do a sit-up or run . A.124-A.125. The Petitioner's testimony is that Dr.Mancall dissuaded him from a diagnosis involving the spine. "No.No. Don't touch the spine. " A.28-A.32 Diplomate Deng placed the spinal rigidity in the 7/96 time period- a full 5 months preceding Dr.Mancall's exam. A.33-43 including Amicus Curiae Brief and a personal appearance at trial by Diplomate Deng. 5-4-04

United States Court of Appeals for 3rd Circuit
No. 04-3103

JOSEPH S. MARESCA
APPELLANT

v.

ELLIOT L. MANCALL MD
THOMAS JEFFERSON UNIVERSITY HOSPITAL

On Appeal from the United States District Court
For Eastern District Pennsylvania
(D.C. Civil No. 01-cv -5355
District Judge: Honorable Legrome D. Davis

Submitted Under Third Circuit L.A.R. 34.1(a)
June 8, 2005
Present:Rendell, Fuentes and Garth, Circuit Judges

SUR PETITION FOR A PANEL REHEARING

The petition for rehearing filed by appellant having been submitted to all judges who participated in the decision of this court, and no judge who concurred in the decision having asked for a rehearing, the petition for rehearing is hereby DENIED.

BY THE COURT:
/s/Marjorie O. Rendell
Circuit Judge

Dated: December 19, 2005
DMM/cc: Mr. Joseph S. Maresca (Pro-Se)
Audrey J. Copeland, Esq.
Michael J. Panichelli, Esq.
Paul E. Peel., Esq.

United States Court of Appeals 3rd Circuit
Case: 04- 3103 Maresca (Plaintiff) v. Mancall MD and
Thomas Jefferson University Hospital TJUH- (Appellees)

Docket Entries: Telephonically with the Court Clerk 2-24-06

1. Docket opened
2. Receipt of the Record
3. Motion to Correct the Record
4. Motion to Amend the Caption by Appellee
5. Extension of Time to File Transcripts
6. Appearance of Michael Panichelli, Esq.for Dr.Mancall MD
7. Appearance of Paul Peel, Esq. of TJUH
8. Disclosure statement of TJUH
9. Motion by Dr.Mancall to Amend Caption
10. 8-11-04 Order Denying Extension of Time
11. Motion for Leave to File Trial Examinations
12. Clerk Motion Granted to Amend Caption of Appellee
13. Clerk Order -Appellant Motion to File Trial Transcript Granted
14. Certified Copy Order to District Ct. for Trial Transcripts
15. Jennifer Haberle-Non-Participation Letter
16. Filing of the Record of the District Court
17. Brief Notice Issue
18. Opposition Filed by Appellees
19. Brief of Appellant filed
20. Notice Telephone Request
21. Completion received

Docket Entries of the Appellate Court 3rd Circuit -
Case 04- 3103 continued

22. Proposed Amicus Brief of Diplomate Charles Deng
23. Clerk Order Referring the Motion to Merit Panel
24. Brief of TJUH
25. Appearance of Audrey Copeland, Esquire
26. Brief of Dr. Elliot L Mancall MD
27. Motion for Extension of Time-Reply Brief Appellant
28. Order Granting Reply Brief
29. Motion for Extension of time for filing Reply Brief-Appellee
30. Clerk's Order Granting Motion for Extension of time for filing Reply Brief-Appellee
31. Transcript purchase order form
32. Transcript Scheduling Order
33. Part 2-Court Reporter Purchase Order Form
34. Part 3- Purchase Order Court Reporter
35. Appellant Filing for Extension of Time for Court Reporter Transcripts
36. Clerk's Order Granting the Motion
37. Supplemental Appendix by the Appellant
38. Order Granting Supplemental Appendix
39. Supplemental Appendix Filed

United States Court of Appeals 3rd Circuit 04 - 3103
Docket Entries-continued

40. Reply Brief Filed
41. Case Opposition
42. Judgment Order
43. Bill of Costs for Appellee-Dr.Mancall MD
44. Non-Compliance Motion Filed -Exhibits for Petition to Rehear
45. Appellant Motion to File Exhibits.-Petition to Re-hear by the Merits Review Panel
46. TJUH response
47. Order Denying Appellant Motion for Leave to File Exhibits
48. Petition to Rehear Filed
49. Mandate Issued 12-19-05
50 Record Returned